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207
REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL,

DURING THE YEAR 1898.



REPORTED UNDER THE AUTHORITY OF
THE LAW SOCIETY OF UPPER CANADA.

VOLUME XXV.

TORONTO:
ROWSELL & HUTCHISON.

1899.

ENTERED according to the Act of Parliament of Canada, in the year of
our Lord one thousand eight hundred and ninety-nine, by THE
LAW SOCIETY OF UPPER CANADA, in the Office of the Minister of
Agriculture.

JUDGES
OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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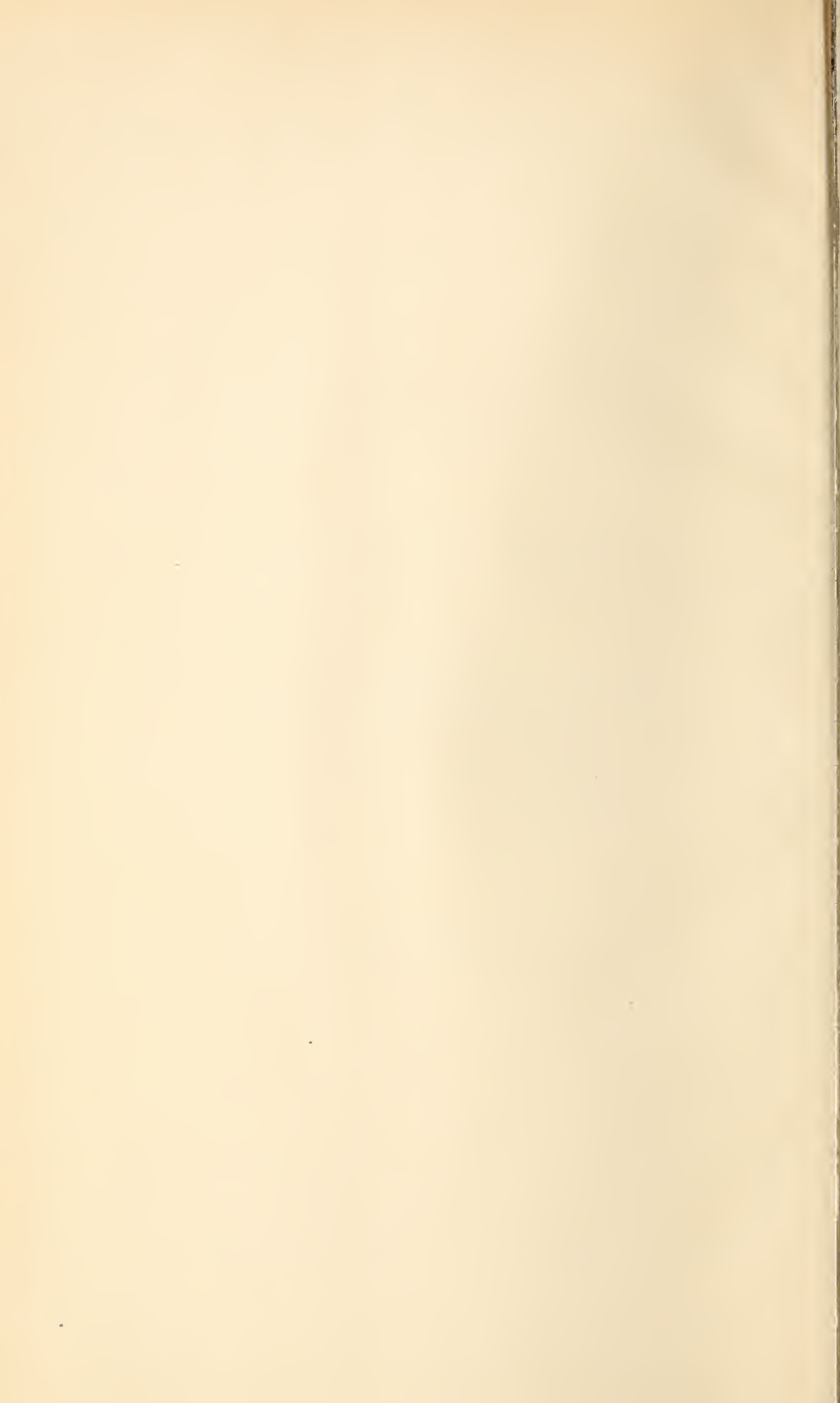
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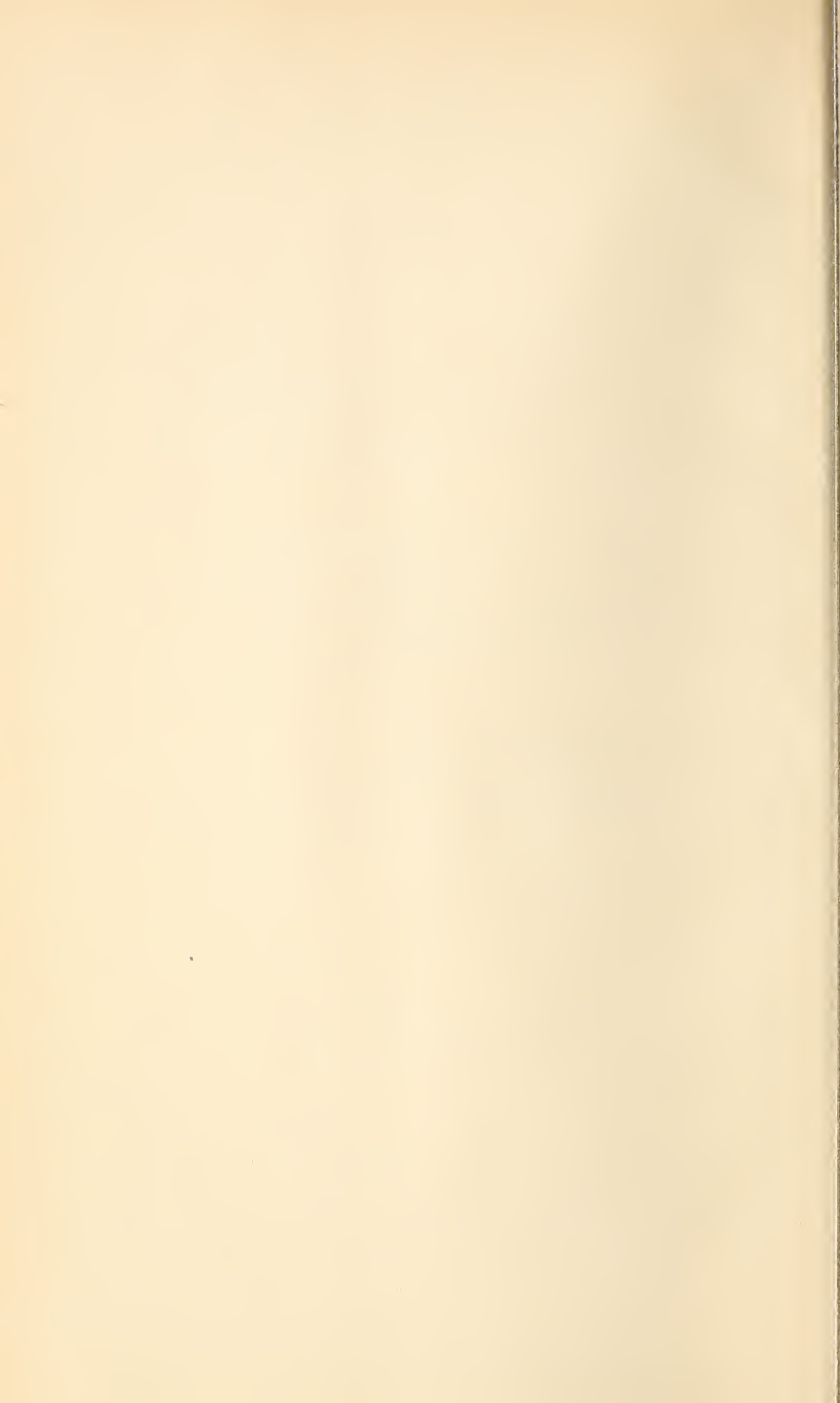
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MEMORANDA.

On the 23rd of February, 1898, the Queen was pleased to grant the dignity of a Knight of the United Kingdom of Great Britain and Ireland unto the HONOURABLE GEORGE WILLIAM BURTON, Chief Justice of Ontario.

On the 21st of June, 1898, JAMES FREDERICK LISTER, Esquire, one of Her Majesty's Counsel, was appointed a Justice of Appeal.

ERRATUM

Page 17, 3rd line from the foot : For "*Cerri v. Ancient Order of Odd-fellows*" read "*Cerri v. Ancient Order of Foresters.*"

ONTARIO APPEAL REPORTS.

MAIL PRINTING COMPANY V. CLARKSON.

Bankruptcy and Insolvency—Assignments and Preferences—Contingent Claim—Advertising Contract—R. S. O. ch. 124, sec. 20, sub-sec. 4.

Where an estate is being administered under the Assignments and Preferences Act, R. S. O. ch. 124, claims depending upon a contingency cannot rank, but only debts strictly so called.

An advertising contract gave the advertiser in consideration of the sum of \$1,000 the right to use certain advertising space in a newspaper at any time within twelve months, the advertiser agreeing to pay at the end of each month for the space used in that month, and at the expiration of twelve months, whether the space had been used or not, to pay \$1,000 less such sums as might have in the meantime been paid. The advertiser before using any space, and before the expiration of twelve months, made an assignment for the benefit of creditors pursuant to R. S. O. ch. 124 :—

Held, reversing the judgment of *BOYD, C.*, 28 O. R. 326, that the \$1,000 would not necessarily become due by effluxion of time, and that the newspaper company could not rank.

Grant v. West (1896), 23 A. R. 533, applied.

THIS was an appeal by the defendant from the judgment of *BOYD, C.*, reported 28 O. R. 326. Statement.

The defendant was the assignee for the benefit of the creditors of *Samson, Kennedy & Co.*, under an assignment made, pursuant to the provisions of R. S. O. ch. 124, on the 9th of December, 1895. The plaintiffs claimed that they were entitled to rank against the estate in the defendant's hands for \$1,000 under the following agreement :—

We the undersigned agree with The Mail Printing Company to advertise our regular business announcements for twelve months from this date, for the sum of one thousand dollars, payable as used monthly, for which we are to have the right to occupy the space of twenty thou-

Statement. sand lines agate, in the advertising columns of The Daily or Weekly Mail and Empire or in Farm and Fireside, upon the conditions specified below and on the back of this contract. In consideration of The Mail Printing Company agreeing to furnish them with space at the reduced rates above mentioned they agree that should they not avail themselves of the right to occupy the said space within the said specified time, such failure shall not relieve them from the obligation to pay The Mail Printing Company at the expiration of said time the said \$1,000, less such amounts as may have been previously paid on account of this contract.

SAMSON, KENNEDY & Co.

Toronto, July 22nd, 1895.

Upon the back of the contract there were certain conditions as to the measurement and position of the advertisements, and also the following special conditions :—

Advertisements at all times to be subject to approval of the managing director of The Mail Printing Company, who reserves to himself the right to insert or otherwise.

If this contract is broken through insolvency or other cause The Mail Printing Company shall have the right to cancel the contract and charge at the casual single insertion rate for the space occupied under the contract.

Advertisements left out by accident at any time, or for the reason that the special space contracted for is otherwise occupied will receive insertions at end of contract to make good the omission.

In case of errors or omissions in legal or any other advertisements, the company do not hold themselves liable for damage further than the amount received by them for such advertisement.

At the time of the assignment of Samson, Kennedy & Co. for the benefit of creditors no space had been used under this agreement.

The action was tried at Toronto on the 25th of February, 1897, before BOYD, C., who, on the 6th of March, 1897, gave judgment in the plaintiffs' favour. Statement.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 23rd of September, 1897.

Thomson, Q.C., for the appellant. Section 3 of the Act governs this case, and sub-section 4 of section 20 does not carry the matter further. That refers merely to claims in respect of debts that will accrue due by effluxion of time: *Grant v. West* (1896), 23 A. R. 533. This case is very like *Hopkins v. Thomas* (1860), 7 C. B. N. S. 711. If the newspaper had discontinued publication or had refused to insert the advertisements there would have been no right to recover. See also *Parslow v. Dearlove* (1804), 4 East 438. The plaintiffs are entitled in the event of the advertiser's insolvency to charge a higher rate for the space used: that provision defines the extent of the remedy.

C. J. Holman, for the respondents. This is not like *Grant v. West* (1896), 23 A. R. 533. It is not a question of damages. There is a definite agreement to pay a certain sum at a certain time. The plaintiffs had alternative rights; they could either sue from time to time for the space used, or else wait till the end of the year, and then sue for the whole sum, whether the space had been used or not. There is an express promise to pay \$1,000 in consideration of the newspaper's agreement to give space. The case comes within sub-section 4 of section 20, which is very wide in its terms: *Wood v. DeMattos* (1865), L. R. 1 Exch. 91; *Tillie v. Springer* (1892), 21 O. R. 585. No assessment of damages is necessary here, and that distinguishes *Grant v. West* (1896), 23 A. R. 533. *Parslow v. Dearlove* (1804), 4 East 438, turned entirely upon the wording of the Act as to claims on written instruments; and *Hopkins v. Thomas* (1860), 7 C. B. N. S. 711, on the restrictive clause of the statute then in force. The possibility of a refusal by the plaintiffs to insert advertisements is no

Argument. answer. There is no allegation by the defendants of a refusal to perform or incapacity to perform, and the evidence shews that there was always ample space available. The plaintiffs were not bound to put an end to the contract; that was an option in their favour. See also *In re Willis* (1849), 4 Exch. 532; *Ex parte Brooke* (1850), 6 D. M. & G. 771.

Thomson, Q. C., in reply.

January 11th, 1898. BURTON, C. J. O.:—

The agreement on which the plaintiff bases his claim appears to have been prepared with great care, and is apparently very fair and equitable in its terms, and advantageous to all parties, and the claim itself is one which one would struggle to sustain if possible to do so.

Notwithstanding the weight which is undoubtedly due to the opinion of the learned Chancellor, I am unable to agree in his conclusion in holding that at the time of the assignment any thing in the nature of an existing debt had arisen under the contract.

In *Grant v. West* (1896), in this Court, 23 A. R. 533, we held that a claim for unliquidated damages not reduced to a judgment before the date of the assignment was not provable.

It is contended with much force that the word "claim" is very wide, but we were forced to hold in that case that wherever a claimant was referred to, the language of the statute seemed to point to a claim against one who was a debtor, and sub-section 4 of section 20, which is so much relied on in the present case, was, in our opinion, indicative of a very clear intention to confine it to claims for debt—*debitum in presenti*—though it might be *solvendum in futuro*.

The learned Chancellor has treated this as a debt of that description. He goes so far, indeed, as to treat it as not essentially different from the case of a promissory note payable at a future time.

I am unable to adopt that view. So far as the agreement might have been acted upon by actual advertising a debt would have arisen for the space used each month, and if the whole space had been exhausted the claimants would have been entitled to the full \$1,000 before the expiration of the term; they might also at the expiration of the twelve months have been entitled to the full sum of \$1,000, although the firm had not availed themselves of the space to which they were entitled; that would depend upon the due performance of the engagement on the part of the plaintiffs; but how can it be said that at the date of the assignment there was a debt existing although the payment of it was deferred? The \$1,000 would not become due necessarily by the mere effluxion of time; the contract was entirely executory; it might or might not ripen into a debt; that depended upon circumstances. In declaring upon such a contract after the expiry of the twelve months, my impression is that under the old form of pleading it would have been necessary to aver and prove that the plaintiffs had always been able and willing to afford the space stipulated for, and, in any event, the non-ability or refusal to supply the space when properly required would have afforded a complete answer to the claim.

Judgment.

BURTON,
C.J.O.

The case differs, therefore, essentially from the case of a promissory note, where the debt actually exists the moment the note is signed, although not payable it may be for months afterwards.

I think, with great respect, that this was not a debt payable *in futuro*, and was, therefore, not provable upon the estate, and that we must allow the appeal.

OSLER, J. A. :—

The claim which is provable under the Act is one by a creditor against a debtor. It must be a claim which is due or presently payable at the date of the assignment, or a claim which has not yet "accrued due," to use the

Judgment.OSLER,
J.A.

language of the Act, but which is about to do so, and the amount of which may, for the purpose of proof, be ascertained by the application of the simple method prescribed by sec. 20, sub-sec. 4, viz., by deducting interest therefrom for the time which has to run before the claim becomes due. For this purpose, therefore, the time of payment is, as it were, accelerated, to use the learned Chancellor's expression in *Tillie v. Springer* (1892), 21 O. R. 585, and the result may even be, if the estate prove sufficient, that the claim, subject to this deduction, will be paid in full, just as if it had been actually a claim *due* at the date of the assignment. This sub-section indicates the character of the claim which, though not yet payable, may be ranked for as if it were—a claim, namely, which is *only* not payable because the time for payment has not yet arrived, and the amount of which, therefore, for the purpose of immediate payment out of the fund assigned, may justly be ascertained by making a proper abatement. Such would be the case of a promissory note not yet due, or payable by instalments, or of any other contract to pay a sum of money absolutely and at all events.

Where, however, the time for payment has arrived at the date of the assignment, though the right to payment may depend upon some condition precedent having been performed, I do not say that such a claim is not one which may be ranked for, and the claimant shewn to be a creditor within the Act, on proof of the condition having been performed. This would be wholly different from setting up the claim, and attempting to rank for it, not only before the time for payment had arrived, but before the performance of the condition precedent, and dispensing with the latter altogether.

To apply these observations to the case before us :—For all monthly payments earned on account of the whole yearly charge at the date of the assignment there would clearly be the right to rank. There were, however, none such, as the insolvents had used none of the space they were entitled to. So also, if the year had then elapsed at

the expiration of which the \$1,000 would have been payable, less any sums which might have already been paid thereon. But it is clear that in that case the plaintiffs would have been obliged to prove either that the whole space contracted for had been used by the insolvents, or that they had always been ready and willing to furnish it to them, and circumstances are readily conceivable in which they might be unable to prove the latter. Therefore the \$1,000 was not a sum payable absolutely, and at all events, at the expiration of the year, as in the case of a promissory note for the like amount. The conclusion necessarily is that, the space not having been used, and the year not having expired, at the date of the assignment, the plaintiffs were not then creditors of the insolvents within the meaning of the Act, inasmuch as from the very nature of the case they could not prove performance of the conditions precedent, which, quite apart from the effluxion of time, they would have had to prove in order to shew themselves entitled to the money in question. There could be no breach of the contract, regarded as a contract in a certain event to pay the \$1,000, until the expiration of the year, and *non constat* that anything would ever be payable thereon. Such a case as this is not provided for by the Act, and therefore I am obliged to say that the appeal should be allowed.

Judgment.

OSLER,
J.A.

MACLENNAN, J. A. :—

This appeal seems to depend on whether the respondents' claim was a debt at the time when the assignment was made. If it was, then section 20, sub-section 4, of the Assignments Act applies, and they have a right to prove against the insolvent estate, otherwise not. What the sub-section seems to provide for is *debitum in presenti, solvendum in futuro*. Can it be said that there was such a debt in December, 1895? If the space was used month by month a proportionate part of the \$1,000 became payable at the end of each month, but so far as not used nothing was to

Judgment. be payable until the end of the year. The firm could
MACLENNAN, defer any use of the space until the last month, and could
J.A. claim to use it all in that month, or perhaps on the very last days or day of the year. One of the conditions on the back of the contract, and to which it is subject, is: "Advertisements at all times to be subject to approval of the managing director of The Mail Printing Company, who reserves to himself the right to insert or otherwise." Can it be said, having regard to the contract and condition, that when the assignment was made there was a debt, or that it was certain there ever would be a debt? What if before any space was used the company suspended publication? Or, what if, on the authority of the condition above set forth, the managing director refused to insert the firm's advertisements altogether? In such case there could be no liability on the part of the firm. If the company were suing the firm at the end of the year, it would be necessary for them to allege and prove that they were always ready and willing to insert the firm's advertisements, but that the latter neglected to avail themselves of their right, and unless they made and proved that allegation their action would necessarily fail.

I am, therefore, with great respect of opinion that there was no debt, and so no claim, at the time of the assignment, which the respondents were entitled to prove against the estate of the insolvents, and that the appeal must be allowed.

Moss, J. A. :—

What is meant by a "claim" in the various sections of R. S. O. ch. 124, was discussed in *Grant v. West* (1896), 23 A. R. 533, and the conclusion was reached that it means a debt due, or accruing due. And sub-section 4 of section 20 was specially referred to as indicating more pointedly than any other that such is the meaning of the term used in the statute.

The word "due" may mean "owing" or "payable," ac-

cording to the connection in which it appears. Here I think it should be read as meaning "payable," and the words "claim not accrued due" should be read as meaning "debt owing but not presently payable."

Judgment.

Moss,
J.A.

A debt is defined to be a sum of money which is certainly, and at all events, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: *Per Lindley, L. J., in Webb v. Stenton* (1883), 11 Q. B. D., at p. 527.

This definition includes such a claim as one arising on a progress certificate under a building contract with time of payment deferred, or a call on shares in a company made payable at a future date: *Pickering v. Ilfracombe R. W. Co.* (1868), L. R. 3 C. P. 235; but not a claim in respect of a debt payable on a contingency. That sub-section 4 of section 20 was not intended to include the latter class seems apparent from the concluding part providing for a deduction for interest for the time which has to run "until the claim becomes due." It is evidently contemplated that the claim will certainly become payable in course of time without any further action on the part of either creditor or debtor. No rendering of any further duty or service to the debtor and no further act on his part in order to complete the obligation seem to be regarded as requisite.

If this be so the person whose claim has not accrued due, mentioned in sub-section 4, is a person holding a claim in respect of a debt which is owing by virtue of an existing obligation, but has not become payable at the time of the assignment. The holder of such a claim is entitled to prove for it, and the question is whether the plaintiffs' claim is of this nature.

The agreement upon which the plaintiffs found their claim was, as the evidence shews, entered into between the parties in view of certain advantages accruing to each from the making of it at that time. By means of it the

Judgment.

Moss,
J.A.

company secured the sale of a specified quantity of space for business announcements or advertisements of the firm of Samson, Kennedy & Co. in their newspapers for twelve months, and the firm acquired the use of the advertising columns of the newspapers for twelve months at one-third of the usual rates.

The substance of the agreement is that the company gives to the firm the right to occupy space to the extent of 20,000 agate lines for advertising its business announcements during twelve months from the 22nd of July, 1895, for the sum of \$1,000, the quantity of space of which the firm avails itself during each month to be paid for at the rate of five cents per line. At the expiration of the twelve months the \$1,000, or balance remaining, is to be paid though the firm may not have availed itself of the right to occupy the space or the whole of it.

If the firm occupies and uses all the space before the expiration of the twelve months, the company is entitled to receive the whole sum without waiting for the expiration of the twelve months. If the firm does not occupy or use all or any of the space within the twelve months, it must, nevertheless, pay the whole sum at the expiration of the time.

But in order to entitle the company to receive the \$1,000, it must either have actually furnished the space required and called for within the twelve months, or, subject to the special conditions, have been able, ready and willing to do so, from the date of the agreement to the expiration of the twelve months.

Unless the space was actually used during the twelve months, it could not be known until the expiration of that period whether the company had earned the \$1,000 or not. If, in the meantime, it failed, or its establishment and plant were completely destroyed, or if by some other means it became beyond the company's power to fulfil its part of the agreement, it would not be entitled to be paid. A deliberate breach of the agreement by the company would put an end to it so as to disentitle the company to demand the \$1,000 at the expiration of the twelve months.

Whenever within the twelve months the firm uses some

of the space there is a debt for the price of the space so used to be paid at the expiration of a month. No further debt arises until the user of more space within the twelve months. In the meantime the company cannot call upon or require the firm to use the space. It can only hold itself in readiness to supply the space if, and when, required or demanded. It would be an answer to an action for the \$1,000, or any part of it, brought by the company after the expiration of the twelve months to shew that the firm had demanded the space contracted for, but the company had neglected, or refused, or were unable, to supply it.

Judgment.

Moss,
J.A.

The debt is created only as the company performs its part of the agreement, or by lapse of the twelve months without any default on its part.

The contingency of the contractor for space becoming insolvent is provided for by one of the conditions endorsed on the agreement. It is agreed that in case the contract is broken through insolvency, the company shall have the right to cancel the contract and charge at the casual single insertion rate for the space occupied. Doubtless the company is not driven to so deal with the contract, but the presence of this condition is an indication that it was not contemplated that upon insolvency during the currency of the year there was to arise an immediate right to the \$1,000, or the balance not then actually earned.

It is not agreed that the insolvency is to convert the unearned amount into a debt payable at all events. If the company does not choose to adopt the terms of the condition, and cancel the contract, it remains to be worked out according to its terms.

The nature of the agreement, and the mode of its performance, shew, in my opinion, that at the time of the assignment there was not an existing debt payable at all events, with the time of payment only deferred.

It follows that the claim is not one capable of being proved in the insolvency proceedings.

I think that the appeal should be allowed.

Appeal allowed.

R. S. C.

IN RE RODEN AND THE CITY OF TORONTO.

Statutes—Construction—Amendment—Retroactive Effect—Limitation of Actions—54 Vict. ch. 42, sec. 16 (O.).

Unless there is a clear declaration in the Act itself to that effect, or unless the surrounding circumstances render that construction inevitable, an Act should not be so construed as to interfere with vested rights.

Section 16 of 54 Vict. ch. 42 (O.), limiting the time for the enforcement of claims for compensation by persons injuriously affected by the exercise of municipal powers of expropriation does not apply to a claim existing at the time of the passage of the Act. Judgment of the Official Arbitrator affirmed.

Statement. APPEAL by the city of Toronto, and cross-appeal by Roden, from an award of the Official Arbitrator.

Roden claimed compensation for land alleged to have been injuriously affected by the work done by the city of Toronto in the improvement of the river Don. The main claim—for loss of frontage—was disallowed, but the Official Arbitrator awarded the claimant \$500 damages for interference with a right of way. The claim arose in October, 1887, but the demand for compensation was not made till the 13th of October, 1896.

The appeal and cross-appeal were argued before BURTON, C.J.O., USLER, MACLENNAN, and MOSS, J.J.A., on the 28th and 29th of September, 1897.

Fullerton, Q.C., and *W. C. Chisholm*, for the city of Toronto. The claim for damages for interference with the right of way is not within the scope of the reference, and there is no evidence to support it. The Official Arbitrator took a view of the place in question and founded his award on that view but he has not complied with the provisions of section 401 of the Act of 1892. Apart from this the claim is barred. It is governed by section 483, as amended by section 16 of 54 Vict. ch. 42 (O.). That amendment is general in its terms and must apply to all claims then existing, or thereafter to arise, especially in view of the fact that the Act did not take

effect for some time after it was passed: Maxwell, 2nd ed., **Argument.** pp. 269, 271; *Pardo v. Bingham* (1869), L. R. 4 Ch. 735; *Regina v. Leeds and Bradford R. W. Co.* (1852), 18 Q. B., at p. 346; *Towler v. Chatterton* (1829), 6 Bing., at p. 264; *Bell v. Walker* (1873), 20 Gr. 558; *Grey v. Ball* (1876), 23 Gr. 390.

H. M. Mowat, for the claimant. The special Act for the improvement of the river Don governs this case, and in it there is no limitation clause. At any rate the amendment is not retroactive. A statute is if possible to be construed so as not to interfere with existing rights: *Gardner v. Lucas* (1878), 3 App. Cas. 603; *Moon v. Durden* (1848), 2 Exch. 22.

Fullerton, Q. C., in reply.

January 11th, 1898. BURTON, C. J. O. :—

The only point we think really calling for consideration is as to the effect of the 16th section of 54 Vict. ch. 42 (O.), limiting the time for making a claim for compensation.

The claim arose under a special Act passed in 1886, enabling the Municipal Council of Toronto to straighten the river Don, which provided that any claim for damages or compensation by persons whose lands were injuriously affected by the exercise of the powers conferred by the Act should be settled and determined by arbitration under the provisions of the Consolidated Municipal Act of 1883, and amendments thereto, if any, in that behalf. No amendments had been made at the time the claim in this case arose, which was in the year 1887.

At that time the claimant had a vested right or claim to compensation, although he did not prefer his claim until some years afterwards, and the award which is appealed against was not made until February, 1897.

There was under the Acts which were in force when the claimant's rights accrued no limitation as to the time for preferring and enforcing his claim.

Judgment.

BURTON,
C.J.O.

The claim arises under the special Act for improving the river Don, the mode of enforcing it being provided for by the Municipal Act then existing, the Act of 1883, and the question is whether the amendment made by the Act of 1891 to section 483 of the Consolidated Municipal Act, imported from the Act 46 Vict. sec. 486 (O.), has any application to a claim for compensation under the special Act.

The inclination of my mind is to hold that the limitation was not intended to apply to claims for compensation under the special Act, but was applicable only to the general exercise of the power of municipal councils, but if I am wrong in that construction I am of opinion that the limitation was only intended to apply to cases arising after the enactment came into operation.

The amendment added these words to the section : " and such claim shall be made within one year from the date when the alleged damages were sustained, or became known to the claimant." This Act was passed on the 4th of May, 1891, but was not to take effect, or come into force, until the 1st of July following.

The general rule, as laid down in the Courts, is that unless there is some declared intention of the Legislature, clear and unequivocal, or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and not retrospective, or, as expressed in one case by Lord Justice Bowen, except in special cases the new law ought to be so construed as to interfere as little as possible with vested rights.

Cockburn, C.J., expresses the same idea in this way : " It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act " : *Regina v. Ipswich Union* (1877), 2 Q. B. D. 269.

And Lord Justice Bowen, in a recent case, again expressed the opinion that statutes should be interpreted if possible

so as to respect vested rights; and in a Scotch case, still more recent, the same idea is expressed in these words: "For it is not to be presumed that interference with existing rights is intended by the Legislature, and if a statute be ambiguous the Court should lean to the interpretation which would support existing rights."

Judgment.

BURTON,
C.J.O.

There are some cases in which judges have refused to allow statutes to have a retroactive operation, although their language seemed to imply that such was the intention of the Legislature, because, if the statutes had been so construed, vested rights would have been defeated: see *Gardner v. Lucas* (1878), 3 App. Cas. 603; *Moon v. Durden* (1848), 2 Exch. 22; and although in the latter of these two cases the parties to suffer were successful gamesters not much the object of favour with the Legislature.

In the House of Lords, Lord Selborne, in a case then before them, *Main v. Stark* (1890), 15 App. Cas. 384, at p. 387, said: "Their Lordships of course do not say that there might not be something in the context of an Act of Parliament, or to be collected from its language, which might give to words *primâ facie* prospective a larger operation, but they ought not to receive a larger operation unless you find some reason for giving it."

There is, of course, a well-known exception to this rule, viz., where the enactments merely affect procedure and do not extend to rights of action. In such case the rule is reversed and the statute is retrospective, unless there is some good reason or other why it should not be; the rule is usually expressed by saying that there is no vested right in procedure or costs.

There is also another ground on which it has been sometimes held that a statute is intended to have a retrospective effect, namely where it contains a proviso that it is not to come into immediate operation upon its passing.

That was one of the grounds relied on for the decision of the Court in *Towler v. Chatterton* (1829), 6 Bing. 258; but that was unnecessary to the decision, and that ground

Judgment. was commented upon adversely by Rolfe, B., in *Moon v. Durden* (1848), 2 Exch. 22.
BURTON,
C.J.O.

No doubt in a subsequent case, *Regina v. Leeds and Bradford R. W. Co.* (1852), 18 Q. B. 343, 21 L. J. M. C. 193, Lord Campbell spoke approvingly of that portion of the decision in *Towler v. Chatterton*, and he uses this language: "If the Act had come into operation immediately after the time of its being passed the hardship would have been so great that we might have inferred an intention on the part of the Legislature not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal."

That case was reversed upon another ground so that the present question was not considered on the appeal.

Now I concede that if the amendment itself to section 483 had stood alone with such a proviso the argument would not be without weight, but that was not the case here. The Act of 1891 contained a great number of amendments of various kinds, and it was provided that the whole Act, with the exception of one clause, should not come into effect until the 1st of July, some few weeks later. In that view the delay has but little significance.

We were referred to two cases under the registry law—*Bell v. Walker* (1873), 20 Gr. 558, and *Grey v. Bull* (1876), 23 Gr. 390, but it seems to me those cases do not apply. I think that the judgment of Blake, V.-C., in the former case, put the decision on the right ground, that by the express words of the statute no equitable lien should be deemed valid in any Court after the Act came into operation as against a registered instrument; it contained no exception. The Vice-Chancellor refers to the Act not coming into operation for two months. The fact seems to have been questioned in the subsequent case, but it does not seem to be of much significance, the parties

having the equitable liens, could not, in the majority of cases, improve their position, their claims not being capable of registration, and in other cases their claims not being due they could not seek the aid of the Courts.

Judgment.
BURTON,
C.J.O.

I do not think in the present case anything has been shewn to induce us to break in upon the rule which has been laid down not to construe a statute as retrospective which interferes with vested rights unless compelled to do so by the language used.

The award itself seems to be supported by the evidence and ought not to be interfered with.

The appeal and the cross-appeal should be dismissed.

OSLER, J. A.:—

I think this award may be supported. The claim for which the arbitrator has allowed the respondent \$500, though not in terms expressed, was yet, as an item of damage, included in the general claim, and I cannot see that any injustice has been done to the appellants in the way in which the learned Official Arbitrator has dealt with it. The absence of the statement in writing, required by section 401 of the Municipal Act, where the arbitrator has proceeded partly on a view, as he has done here, would merely be a ground for referring the case back, if there were not, looking at the whole of the proceedings, sufficient to allow the Court to form a judgment of the weight which should be attached to the value of the information acquired by the arbitrator by means of the view: *In re Northumberland and Durham and Cobourg* (1860), 20 U. C. R. 283.

I cannot agree that the limitation clause added to section 483 of the Municipal Act by 54 Vict. ch. 42, sec. 16 (O.), is a defence. It certainly is not unless we give it a retrospective operation. In the case of *Cerri v. Ancient Order of Oddfellows* (post p. 22), before us during this term, I have referred to many authorities which shew how general and stringent is the rule which forbids

Judgment.

OSLER,
J.A.

such a construction unless the intention of the Legislature is unmistakably manifested in favour of it. As Mr. Sedgwick observes in his treatise upon the Construction of Statutory and Constitutional Law, 2nd ed., p. 164: "The effort of the English Courts appears always to be to give the statutes of that kingdom a prospective effect only, unless the language is so clear and imperative as not to admit of doubt." The most recent decisions shew that this principle has been in no way relaxed.

No doubt in the case of an Act dealing with a single subject such an intention has been inferred from the fact that the period of its coming into operation has been postponed: *Towler v. Chatterton* (1829), 6 Bing. 258; *Re Edmundson* (1851), 17 Q. B. 67; *Regina v. Leeds and Bradford R. W. Co.* (1852), 18 Q. B. 343;—overruled in effect, though not on this point, in *Regina v. Edwards* (1884), 13 Q. B. D. 586; *Hardcastle's Construction of Statutes*, 2nd ed., pp. 377-380.

But this is by no means laid down as an inflexible rule, and where the provision in question is found in an "omnibus" Act of forty-three sections dealing with a variety of subjects having no relation to each other, except as being comprised in a general municipal amendment Act, it becomes very difficult to infer, merely from the commencement of the Act having been postponed, an intention that a particular section shall from that time have a retrospective operation. More especially is this the case when most of the sections cannot, from the very nature of the subjects dealt with, operate in that manner, and where, in one instance at all events, namely section 42, the language, quite apart from any inference of intention drawn from the postponement of its coming into operation, is plainly retrospective.

The respondent's cross-appeal is a very hopeless one. I have read the evidence and am clearly of opinion that it justifies the arbitrator's finding.

The appeal and cross-appeal should therefore both be dismissed with costs.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN,
J.A.

I am of opinion that both appeal and cross-appeal should be dismissed.

The respondent's claim is clearly not barred by the amendment in 1891 of section 483 of the Municipal Act, or by R. S. O. ch. 60, or by the statute of James. The amendment of section 483 is inapplicable, because the claim had accrued and was more than a year old when the Act was passed. The other statutes do not apply because they apply only to actions, which the present proceeding is not.

I think the arbitrator was quite warranted in the allowance which he made for loss of the way from the mill road to the river, along the south limit of the respondent's land ; and I do not think there is any ground established for the conclusion that the right of way had been in any way lost by non-user.

I also think the respondent's cross-appeal cannot succeed.

Moss, J. A. :—

The claim in this matter is made solely for compensation in respect of lands alleged to be injuriously affected by reason of work done by the corporation of the city of Toronto upon what is generally known as the Don River Improvements. The Official Arbitrator disallowed the main claim, which was made in respect of an alleged loss of frontage upon the Don river through the removal of its eastern bank some distance to the west of its original position, but allowed to the claimant the sum of \$500 in respect of a right of way to the river bank which was cut off by reason of the change. The city was also directed to pay the stenographer's and arbitrator's fees, and to bear its own costs of the arbitration.

Both parties appeal from the award, the city complaining of the allowance of any compensation, and of the directions with regard to the costs and the stenographer's

Judgment.

Moss,
J.A.

and arbitrator's fees, and the claimant complaining that the arbitrator erroneously disallowed the other claims, and awarded no costs to the claimant. The Official Arbitrator found and stated in his award that the injury in respect of which the claimant seeks compensation was complete in or about the month of October, 1887. The notice of claim was served on the city on the 13th of October, 1896. It is objected on behalf of the city that the claim is barred under the provisions of section 16 of 54 Vict. ch. 42 (O.), now forming the latter part of section 483 of the Consolidated Municipal Act, 1892. But these provisions do not, I think, apply to the claim presented in this matter. It arose by reason of the exercise by the council of the city of the special powers conferred upon it by those provisions of the Act, 49 Vict. ch. 66 (O.), relating to the Don River Improvements, and not by reason of the exercise of its general powers under the Municipal Act.

And, as already stated, it is a claim for compensation in respect of lands injuriously affected, and not in respect of lands entered upon, taken or used.

The right to compensation in this matter, and the mode of its ascertainment, are provided for by 49 Vict. ch. 66, sec. 1, sub-sec. 6 (O.). And it is only for the purpose of settling and determining the amount that recourse is to be had to the arbitration clauses of the Municipal Act. Such is the effect of the decision in *In re McColl and Toronto* (1894), 21 A. R. 256, and the opinion therein expressed by my brother Osler, that lands entered upon, taken or used under the special Act, 49 Vict. ch. 66 (O.), may be treated as lands entered upon, taken or used in the exercise of the general powers possessed by the municipality, for the purpose of giving effect to section 404 of the Municipal Act, 1883, now section 402 of the Consolidated Municipal Act, 1892, is not opposed to this conclusion. These latter sections apply only to claims for lands entered upon, taken or used, and not to claims in respect of lands injuriously affected. There is no occasion in dealing with this claim to refer for any purpose to section 483 of

the Municipal Act and its provisions do not affect the proceedings herein.

Judgment.

Moss,
J.A.

Upon the other branches of the appeal I agree with the conclusions of the Official Arbitrator. The claim in respect of the right of way over the thirty foot road to the Don is sufficiently embraced in the notice of claim served upon the city.

That it was granted as an easement appurtenant to the half-acre parcel known as the peak comprised in the deed of the lands conveyed by John Scadding to Francis Collins is undoubted. The right to it was never lost or abandoned, and it existed when the city did the work which resulted in the removal of the stream, and the cutting off of the access by the roadway which the deed gave, and the claimant's land was thereby injuriously affected. There is in the award a statement of the view made by the arbitrator, of the property and its surroundings, including the site of the thirty foot roadway, quite sufficient to satisfy the requirements of the Act in that respect: *In re Colquhoun and Berlin* (1880), 44 U. C. R. 631.

The amount awarded, though liberal, is not so excessive as to call for interference, and the appeal as to it should be dismissed.

The claimant's cross-appeal with regard to the loss of frontage on the Don also fails. His paper title does not carry the lands to the Don. The description clearly separates them from the stream by a roadway lying between their western boundary and the eastern bank. And the claim of title by possession fails upon the evidence.

It is clear that at the time when the city did the acts complained of there had been no such possession by the claimant or those under whom he claims as would transfer to him as owner the right to the lands between those embraced in the deeds and the bank of the stream.

It is not necessary to decide whether if a possessory title had accrued to him it would have conferred upon him the rights ordinarily possessed by riparian proprietors or any rights over the water to the thread of the

Judgment. stream, or whether the removal of the stream would give him any cause of action or complaint. It may be that in such a case there would be ground for applying the doctrine which was applied in regard to a land-locked parcel of land in *Wilkes v. Greenway* (1890), 6 Times L. R. 449, reversing Vaughan Williams, J., at p. 290 of the same volume. See also *Ecroyd v. Coulthard*, [1897] 2 Ch. 554. But the claimant having failed to make out a title either by deed or possession the Official Arbitrator rightly disallowed the claim.

**MOSS,
J.A.**

I see no reason for interfering with the disposition of the costs made by the Official Arbitrator.

The appeal and cross-appeal should be dismissed with costs, with the right of set-off.

Appeal and cross-appeal dismissed.

R. S. C.

CERRI V. ANCIENT ORDER OF FORESTERS.

*Benevolent Society—Insurance—Life Insurance—Mistake as to Age—52
Vict. ch. 32, sec. 6 (O.).*

Section 6 of the Ontario Insurance Amendment Act, 1889, 52 Vict. ch. 32 (O.), does not apply to benevolent societies having an age limit for admission to membership, and where a man who was older than the age limited was, owing to his innocent misrepresentation as to his age, admitted as a member and given an endowment certificate, it was held that the beneficiary named therein could not recover.

Judgment of STREET, J., 28 O. R. 111, reversed, MACLENNAN, J.A., dissenting.

Statement. THIS was an appeal by the defendants from the judgment of STREET, J., reported 28 O. R. 111, where the facts and arguments are stated, and was argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 24th of September, 1897.

Aylesworth, Q. C., and *McWatt*, for the appellants.
G. G. Mills, for the respondent.

January 11th, 1898. BURTON, C. J. O. :—

Judgment.

BURTON,
C.J.O.

In the view I take of this case it has become necessary to consider only one question, viz., the applicability of section 6 of 52 Vict. ch. 32 (O.), to these defendants and the contract they entered into with the deceased.

The defendants were incorporated under the Acts in force previous to the revision of the Statutes of Ontario, in 1877, which prohibited them from carrying on their operations for the purpose of any trade or business, but this prohibition was held by this Court in *Swift v. Provincial Provident Institution* (1890), 17 A. R. 66, not to extend to an insurance of members *inter se*, although a difference of opinion existed as to contracts of that nature being within the Acts relating to insurances for the benefit of wives and children.

The Legislature in the following year, presumably in consequence of the remarks made in that judgment, declared that from and after the 10th of March, 1890, no association incorporated under the Friendly Societies Acts should have authority to effect insurances of any kind, although a year or two subsequently they were, under certain conditions, again empowered to make contracts of life assurance, and in those enactments a clause similar in its terms to section 6 of 52 Vict. ch. 32 (O.), but clearly extending to friendly societies, was passed. It was contended before us that this section was retrospective, but this is, I think, not tenable, and I refer to the reasons given in *In re Roden and Toronto* (*ante* p. 12), for so thinking, and I need not repeat them here.

I agree with the contention of the defendants' counsel in holding that the Act is simply and purely an amendment of the Ontario Insurance Act, as it purports to be.

By section 3 the words "company" and "contract" are to have the meaning given to them by the principal Act, and on referring to the principal Act we find that the definition given there is confined to contracts of the nature referred to in sub-section 4 by persons or companies trans-

Judgment.

BURTON,
C.J.O.

acting insurance as a matter of business, and that companies like the defendants are expressly excepted from the operation of the Act.

Section 4 of the amending Act is also confined to companies "transacting business" in Ontario, and cannot include friendly societies, who were prohibited from carrying on any trade or business, and whose operations were strictly confined to a mutual insurance of the members themselves.

But the section contains, in my opinion, internal evidence that it was not intended to apply to a case of this nature, but was confined to cases where a calculation can be made upon the ratio between the premium proper to the stated age, and that proper to the actual age, in other words, to cases where, if the age had been correctly stated, a larger premium would have been exacted, and not to a case where, if the correct age had been stated, no contract at all would have been made. It never could have been the intention of the Legislature to force upon the defendants a contract which they had no intention to make, and which their constitution prohibited.

In the one case the only effect of a mistake innocently made is an increased premium to a corresponding extent, in the other to force upon the society a risk which they would never have undertaken voluntarily.

The case was argued and the judgment below proceeded entirely upon the ground that the case fell within the 6th section of the Act of 1889, and neither in the pleadings nor on the argument before us, was it contended that the defendants had by the rules for the management of the beneficiary fund placed their own construction upon the terms of the warranty, and shewn that what was meant was a statement false to the knowledge of the assured. I am most desirous, if I could see my way to do so, to assist this plaintiff, but I do not think that that is the proper construction of this contract; in fact, the language of the rules seems to lead to the opposite conclusion. In order to secure a cancellation of the membership only,

it is essential that the statement made on admission must be knowingly false, but in the contract of insurance the defendants omit the word "knowingly," and make the truth or untruth of the statement, whether knowingly made or not, the basis of the contract, and it cannot, I think, be controlled by a rule passed for a different purpose.

I regret having to do so, but I think we must, for the reasons I have mentioned, allow the appeal and dismiss the action.

Judgment.
BURTON,
C.J.O.

OSLER, J. A. :—

This was an action brought by the plaintiff, widow of the late Wm. Cerri, against the defendants, of whose order Cerri was a member, upon a beneficiary certificate issued by them to him on the 27th of November, 1891, for the sum of \$1,000, payable at his death, which occurred on the 22nd of August, 1893, to the plaintiff, the designated beneficiary. The certificate sets forth that it was understood and agreed that the truth of the statements and conditions set forth in the medical examination and application for the certificate, and which formed a part thereof, were the conditions upon which Cerri was entitled to the rights, benefits and privileges of the beneficiary fund, and that any untruthfulness or violation of said statements and conditions terminated the membership of Cerri, and that the defendants should not then be liable for the amount secured or any part thereof.

By their statement of defence the defendants pleaded that the age limit fixed by the general laws of their order is 45 years, over which age no person can obtain admission or insurance in the beneficiary fund, as the deceased Cerri knew when he applied for admission, and for the beneficiary certificate, and that in his application therefor, dated the 9th of November, 1891, and in his answers to the questions as to his age in the medical examination and certificate, he untruly stated and represented that his age was 44 at his then last birthday, and that he had been born on the 22nd

Judgment.
OSLER,
J.A.

of March, 1847, whereas in truth he had been born a year earlier, viz., on the 22nd of March, 1846; that the statement of age was of a fact material to be made known to the defendants, that they issued the beneficiary certificate to the insured upon the faith of its being truly stated, and would not have done so had they known that he was over the age of 45 when he made his application, and that they did not discover that the statement was untrue until after his death.

Many other alleged misstatements and untrue answers were pleaded, but the issues raised in respect thereof were all decided adversely to the defendants on the first trial of the case before Ferguson, J. The judgment for the plaintiff at that trial was set aside and a new trial granted by the Divisional Court, confined to the alleged misstatements as to the age of the assured, the findings in other respects being ordered to stand.

On the second trial before Street, J., as thus limited, at the Toronto Fall Assizes, 1896, it was proved that the deceased was born on the 22nd of March, 1846, and not on the 22nd of March, 1847, as he had stated in his application for membership and application for beneficiary certificate, and, therefore, that he was then a year older than he represented himself, viz., 45 years 7 months and 18 days, instead of 44 years 7 months and 18 days. The plaintiff then, relying upon the statute, 52 Vict. ch. 32 (O.), gave evidence to shew that the statement or warranty as to age was made by Cerri in good faith and without any intention to deceive, and, therefore, that she was entitled to recover the reduced amount upon the certificate ascertainable as provided by section 6 of the Act, notwithstanding the misstatements.

This evidence, the admission of which was objected to by the defendants, consisted of declarations or statements which the deceased had made to his wife at the time of their marriage, 23rd of November, 1870, and from time to time afterwards, and statements made by him in applications for insurance to other companies

in October, 1886, and July and October, 1891, that his birthday was the 22nd of March, 1847. Evidence was also given and objected to of conversations between Cerri and a neighbour of his, the earliest of which was some ten years before, in which, when speaking of their ages, Cerri had spoken of himself as having been born in March, 1847. The learned Judge left it to the jury to say whether Cerri, for some reason or other, always believed that he was born in 1847, and when he told the insurance examiner for the defendants he was born in that year he believed it to be true.

Judgment.

OSLER,
J.A.

The jury found that he made the statement in good faith, without any intention to deceive, and the learned Judge subsequently entered judgment for the plaintiff for the reduced amount of \$986, being of the opinion that the case came within the saving of the Act. From that judgment this appeal is brought, and the questions to be determined are: first, whether the Act, 52 Vict. ch. 32 (O.), is applicable to these defendants and the beneficiary certificates issued by them to their members; and second, if so, whether the evidence offered was admissible in support of the plaintiff's contention that the statements and warranty as to age had been made by the assured in good faith and without any intention to deceive.

It is admitted by the defendants in the pleadings that they are a benevolent society incorporated under the Act afterwards consolidated in R. S. O. (1877) ch. 167, R. S. O. (1887) ch. 172, an Act respecting Benevolent, Provident and other Societies. The exact date of incorporation does not appear, but it was about the year 1871, and the beneficiary fund was established in the year 1881.

Incorporated as they were under the Act of 1877 and not that of 1887, they were not precluded from entering into contracts of mutual life insurance, such as is the beneficiary certificate in this case, for the benefit of their own members only: *Swift v. Provincial Provident Institution* (1890), 17 A. R. 66, and inasmuch as they had not been required, before the passage of the Ontario Insurance Act, 50

Judgment. Vict. ch. 26 (O.), R. S. O. (1887) ch. 167, to take out a license to entitle them to enter into contracts of that nature, it was by section 3 of that Act expressly enacted that the Act should not apply to them.

OSLER,
J.A.

Benevolent societies incorporated under the Act of 1887, after the 10th of March, 1890, were, by 53 Vict. ch. 39, sec. 9 (O.), (1890), expressly disabled from undertaking any contract of insurance, mutual or otherwise, within the meaning of the Ontario Insurance Act or of the Act, R. S. O. (1887) ch. 136, to secure to wives and children the benefit of insurance, an enactment, perhaps, unnecessary in view of sec. 1 and schedule, item 10, of the Benevolent Societies Act, R. S. O. (1887) ch. 172.

By the Insurance Corporations Act, 1892, 55 Vict. ch. 39, (O.), it was, however, enacted that after the 31st of December of that year, no insurance (except under the Land Titles Act) should be transacted or undertaken in Ontario except by a corporation duly registered as therein provided, and such a society as the defendants, was, by the name of a friendly society, required to be registered in the friendly society register to be kept under that Act as a friendly society transacting endowment assurance : sec. 1 (4), (12)*d* ; sec. 3 ; sec. 4 (2), *C. (a) (b)* ; sec. 8 ; sec. 27. The defendants have probably procured themselves to be registered under the Act, though whether they have done so or not seems unimportant, as the contract sued on was made in November, 1891. By registration they would be brought under the Act at all events as to insurance business transacted by them thereafter, but they are not brought within the Ontario Insurance Act any more than they formerly were : sec. 27 (7).

Before the passage of the Insurance Corporations Act, 1892, the Legislature had passed the Act 52 Vict. ch. 32 (O.), (1889), intituled "An Act respecting Contracts of Life Insurance," the 6th section of which was relied upon at the trial and on the argument before us as removing the difficulty in the plaintiff's way arising from the warranty of the age of the insured.

This section enacts that where a contract of life insurance, or the application therefor, contains, or the person entering or proposing to enter into it, makes, for the purpose of its being entered into, any statement or warranty as to the age of the person in respect of whose life the contract is made, such contract shall not be avoided by reason only of the age being greater than stated or warranted, if it shall appear that such statement was made in good faith and without any intention to deceive, but the person entitled to recover, shall not be entitled to recover more than an amount which bears the same proportion to the sum which such person would otherwise be entitled to recover as the premium proper to the stated age bears to the premium proper to the actual age of such person, etc.

By the 3rd section "premium" is declared to mean the net annual premium as shewn in the Hm. Table of the Institute of Actuaries of Great Britain, the rate of interest being taken at $4\frac{1}{2}$ per cent. per annum.

The contention of the plaintiff is that these provisions apply to benefit society insurances, as well as to ordinary life insurance policies, in other words, that the Act is of general application, embracing insurance contracts of every description. The defendants on the other hand say that the Act is merely an amendment of the Ontario Insurance Act, and relates only to such policies as that Act applies to.

I regret to be obliged to come to the conclusion that the plaintiff's contention is not well-founded. I think that benefit society insurances are not within the scope of the Act. It is an Act merely in amendment of, or subsidiary to, the Ontario Insurance Act. The first section gives it its title "The Ontario Insurance Amendment Act, 1889." The second declares that the expression, "Principal Act" where it is used in the Act shall mean "The Ontario Insurance Act," and the third, that the words "company" and "contract" where used in the Act, shall respectively have the meaning given to them by the principal Act. If then in the principal Act "company" does not mean or include such a society or corporation as the defendants, and "con-

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

tract" does not mean or include a contract of life insurance undertaken by such a society, as section 3, sub-section 2, of the principal Act shews, it appears to me that they cannot have a more extensive meaning in the amending or subsidiary Act. Moreover, the expression "company transacting business in Ontario," in the 4th section of the Act, seems wholly inappropriate to such a society as the defendants, who are incorporated under an Act which prohibits their incorporation for purposes of trade or business, or the business of insurance: sec. 1 and schedule, item 10, R. S. O. (1887) ch. 172; a prohibition which, as we have held in *Swift v. Provincial Provident Institution* (1890), 17 A. R. 66, does not exclude the power to insure their own members under section 11 of the Act, though it excludes the power to engage in the general business of life insurance.

On the argument of the appeal, though not at the trial, the plaintiff also relied upon the 34th section of the Insurance Corporations Act, 1892, 55 Vict. ch. 39 (O.), which contains provisions substantially similar to those of the 6th section of 52 Vict. ch. 32 (O.). But it appears to me that this section cannot apply to beneficiary certificates granted before the passing of the Act. A statute is not to be construed retrospectively unless it clearly appears either from its subject-matter or from its language that it was the intention of the Legislature that it should be so construed, especially where by so doing it would prejudicially affect vested rights or the legal character of past transactions, or impair the obligation of contracts: *Hardcastle's Construction of Statutes*, 2nd ed., p. 369 *et seq.*; *Gardner v. Lucas* (1878), 3 App. Cas. at p. 601; *Regina v. Ipswich Union* (1877), 2 Q. B. D. 269, where it was said by Cockburn, C. J.: "It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act." And it is thus put in *Moon v. Durdan* (1848), 2 Exch. 22: "The rule is one of such obvious convenience that it will

always be adhered to unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to speak retrospectively." It is, of course, a rule of construction merely and will yield to the intention of the Legislature if clear beyond doubt. See also *Bourke v. Nutt*, [1894] 1 Q. B. at pp. 737, 739. Nothing on the face of this section or elsewhere in the Act, so far as I have been able to understand its extremely complicated and confusing phraseology and arrangement, indicates that it was intended to have a retrospective operation so as to defeat or alter or set up in favour of or against either party a contract of insurance already entered into between them in existence when the Act was passed. The language of the section is: "Where the age of a person is material to any contract within the intent of section 2." That would seem to be prospective, looking forward to contracts which such a society may make in the future, after they have brought themselves within the operation of the Act by registration as a friendly society, and so entitled themselves to carry on such a business. Whether a retrospective construction is to be given to section 34 can hardly depend upon the defendants having brought themselves under the Act after the contract in question was made. Section 4 (2), *C. (b)*, simply provides that contracts entered into before the passing of the Act shall not "hereby" (that is, as I read section 4, by registration of the society as a friendly society) be invalidated. They remain as obligations binding upon the society, and they would be equally so whether the society came in under the Act or remained outside of it, ceasing to transact the special insurance business they had formerly been doing. Could section 34 be held to apply to the contract in that case? It seems to me that it could not; and the fact that the society became a registered one and continued to carry on business can make no difference as regards the application of the section to its contracts in existence when the Act was passed. In some particulars the Act has no doubt been expressly made retrospective,

Judgment.

OSLER,
J. A.

Judgment. *e.g.*, in sec. 35, sub-secs. (3), (6), (7); 37 (2) proviso. In
OSLER, others relating to the form of the contract: sec. 33; or
J.A. discrimination in premiums for insuring persons of the same class or on the same plan: sec. 38 (2), it is expressly prospective, but I do not think that this circumstance entitles us to give a retrospective operation to section 34 not plainly called for by its language, when the effect of so doing would really, as in this instance, be to make for the parties a contract entirely different from that which they have entered into.

In addition to the foregoing considerations it must be said that it is very difficult to see how either of the statutes relied on by the plaintiff can have any application to companies where there is an age limit of insurance, and the actual age of the insured is outside that limit. There is, in such case, no premium proper to the actual age. It is a case in which, had the true age been stated, the constitution of the company would have precluded them from entering into any contract with him at all. The amendment by 58 Vict. ch. 34, sec. 5, sub-sec. 11 (O.), of sec. 34, sub-sec. 1 of the Act of 1892, seems to indicate the opinion of the Legislature that the latter section had no application to cases where there was an age limit: clause further amended by the Insurance Act, 60 Vict. ch. 36, sec. 149 (O.); R. S. O. ch. 203, sec. 149.

The case of *Attorney-General v. Ray* (1874), L. R. 9 Ch. 397, shews, if it were necessary to quote authority, that the misstatement as to age avoids the insurance, but this was not really contested.

MACLENNAN, J. A.:—

Two points were made by the defendants on this appeal; first, that the evidence of *bona fides* on the part of the deceased husband of the plaintiff in representing his age to be only 44 instead of 45 when he applied for membership was inadmissible; and second, that the Act, 52 Vict. ch. 32, sec. 6 (O.), upon which the judgment proceeded, was inap-

plicable. On the first point I am clearly of opinion that the evidence was admissible, and was very cogent evidence of honest belief of what was his true age. Judgment.
MACLENNAN,
J.A.

There is more difficulty upon the other point but upon the whole I am of opinion that the section in question is applicable and was rightly applied by the learned Judge. The section was enacted in 1889, and declares that "where a contract of life insurance or the application therefor contains, or the person entering or proposing to enter into it, makes for the purpose of its being entered into, any statement or warranty as to the age of the person in respect of whose life the contract is made, such contract shall not be avoided by reason only of the age being greater than stated or warranted, if it shall appear that such statement or warranty was made in good faith and without any intention to deceive." It is said that the section is inapplicable because the Act of which it is part is to be cited as "The Ontario Insurance Amendment Act, 1889"; that "principal Act" is to mean "The Ontario Insurance Act"; and that the words "company" and "contract" are to have the meaning given to them by the principal Act, that is, the Ontario Insurance Act, and therefore that the contract dealt with in the section is confined to contracts of insurance other than those of benevolent and provident societies, which latter contracts are excluded from the provisions of the Ontario Insurance Act by section 3, sub-section 2, thereof.

The word "company" does not occur in the section, and the argument must rest entirely, as I think, upon the definition of the word "contract"; and what is said of that in the Insurance Act is in section 1, sub-section 6, which declares that it means and includes any contract or agreement sealed, written or oral, the subject-matter of which is within the intent of sub-section 4. Now, when sub-section 4 is referred to, the contracts there mentioned are contracts of indemnity, guaranty, suretyship, insurance, endowment, tontine, or annuity on life, or any like contract which accrues payable on or after the occurrence of some contin-

Judgment. gent event. I think this language is large enough to include
MACLENNAN, and describe the beneficiary certificate in question; and
J.A. that is made perfectly clear by section 3, sub-section 2, of
the same Act, which declares that it shall not apply to any
benevolent, provident or industrial or co-operative society
not requiring a license for any such contract as aforesaid
before the passing of the Act. I therefore think that the
words "contract of insurance" in section 6 of the Act
of 1889 are in themselves sufficient to include the bene-
ficiary certificate now in question, and that the definition
of the word "contract" in section 3 does not exclude it but
actually includes it. There is therefore as I think nothing
express in this Act to prevent section 6 applying to the
certificates of benevolent and provident societies, nor is
there any such exclusion by necessary implication. By
section 3 of the Insurance Act it was expressly declared
that it should not apply to benevolent and provident
societies which did not require a license before the passing
of it. But for that section the Act would have applied
to those societies. There is no such declaration in the
Act in which the section in question is found. It is to
be observed, too, that although R. S. O. (1887) ch. 172,
relating to benevolent and provident societies, by section 1
and item 10 of the schedule excluded insurance of any
kind from the purposes for which such societies might
be incorporated, R. S. O. (1877) ch. 167, under which
the defendants were incorporated, did not exclude life
insurance: see section 1 and item 10 of the schedule to
that Act.

But there is another ground on which I think the judgment may be supported. When this beneficiary certificate was issued to Cerri he was a member of the defendants' association, and the relations between himself and the defendants were subject to and governed by certain rules. Among these rules there are twenty-nine relating specially to the beneficiary fund; number 17 declares that "any member who shall in his declaration and at the time of his admission *knowingly* make any false statement as to

his age * * shall forfeit all claims to and benefit in this fund, and his certificate of membership shall be cancelled." I think the fair meaning of this rule is that it is only when such a false statement is *knowingly* made that the forfeiture of his claims to and benefit in the fund ensues, and that his membership is liable to be cancelled. Now that being the standing rule governing both the society and its members, I think Cerri had a right to a certificate which would square with the rule, and that the certificate which was issued to him ought to be qualified so as to conform to it. The certificate declares that it is issued upon the condition that Cerri shall comply with all laws, rules and requirements thereof, and that it is understood and agreed that the truth of the statement and conditions set forth in the application for the certificate are the conditions on which he is entitled to the rights, benefits and privileges of the fund, and that any untruthfulness or violation of said statements and conditions terminates his membership, and that the society shall not then be liable. The application which he had signed declares that all his statements therein are true and material to the contract and shall form the basis thereof. Now I think that all this, application and certificate as well, are to be read together with Rule 17, and with the qualification that the statement as to age should have been *knowingly* false. There is no contradiction or conflict between the rule and the contract; the former is referred to in the latter. The applicant is to be subject to the rules, his rights are to be qualified by them, and I think it follows that he must also have the benefit of them so far as they are in his favour. I therefore think that the contract itself, when properly construed, excepts the case of an untruthful statement of age when made not knowingly but in good faith.

Judgment.
 MACLENNAN,
 J.A.

Appeal allowed, MACLENNAN, J. A., dissenting.

R. S. C.

HESSELBACHER V. BALLANTYNE.

Sale of Goods—Contract—Loss of Goods.

Statement. THIS was an appeal by the plaintiff from the judgment of ROSE, J., reported 28 O. R. 182, and was argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 17th and 20th of September, 1897.

Aylesworth, Q. C., for the appellant.

W. M. Douglas, for the respondent.

January 11th, 1898. The appeal was dismissed with costs, the Court holding that, on the evidence, the plaintiff had accepted and taken possession of the logs, and not dealing with the point upon which the case turned in the Court below.

KERVIN V. CANADIAN COLOURED COTTON MILLS COMPANY.

Negligence—Evidence—Master and Servant.

Statement. THIS was an appeal by the defendants from the judgment of a Divisional Court, reported 28 O. R. 73, and was argued before BURTON, C. J. O., OSLER and MACLENNAN, JJ. A., and FALCONBRIDGE, J., on the 10th of June, 1897.

McCarthy, Q. C., and *R. A. Pringle*, for the appellants.

Aylesworth, Q. C., for the respondent.

January 11th, 1898. The appeal was dismissed with costs, the members of the Court being divided in opinion.

OSLER, J. A., and FALCONBRIDGE, J., were of opinion, agreeing with the majority in the Divisional Court, that there was evidence from which it might properly be inferred that the accident was caused by the negligence of the defendants.

BURTON, C. J. O., and MACLENNAN, J. A., were of opinion that the evidence was equally consistent with the theory that the deceased's own carelessness caused his death.

DAW V. ACKERILL.

Church—Incumbent's Salary—Liability of Churchwardens.

The churchwardens of an Anglican congregation which has adopted the free seat system, and in which the only revenue is derived from the voluntary contributions of the members, are not liable to the incumbent for the payment of his salary except to the extent of contributions received by them for that purpose.

Judgment of BOYD, C., 28 O. R. 452, affirmed.

THIS was an appeal by the plaintiff from judgment of Statement.
BOYD, C., reported 28 O. R. 452.

The following statement of the facts is taken from the judgment of OSLER, J.A. :—

This was an action brought by the plaintiff against the churchwardens of Christ Church, in the city of Belleville, to recover arrears of stipend due to him as incumbent of that church.

The defendants deny their liability generally ; as to part of the stipend, say that it was abandoned and given up as an inducement to the defendants to undertake the office of churchwarden for a subsequent year, and as to the whole say that they have no assets or means within their control out of which they can discharge it, the whole income of the church depending upon voluntary contributions only.

It appeared that the plaintiff was appointed rector or incumbent of the church on the 27th of June, 1887. He had held no communication with the then churchwardens or vestry. His salary was paid (for a time) regularly at the rate of \$1,000 per annum. It was an understood fact (*i.e.*, as to the amount) amongst all the members of the congregation, and the plaintiff never spoke to the (then) wardens about it. He was paid in full up to about Easter, 1892.

At the Easter vestry meeting of that year it was resolved that the church, which had, up to that time, been a pewed church, should from thenceforth be a free church. Churchwardens for the year were appointed, and a resolu-

Statement. tion was carried that the rector's salary "should be increased \$200." In that year his salary began to fall into arrear, and in order to make up or cover the deficit it was resolved at the Easter vestry of 1893, that the stipend for the ensuing year should be \$1,500. At Easter of 1894 there was a balance of \$663 remaining due and unpaid to the plaintiff in respect of his stipend, and at the plaintiff's own suggestion, considering the financial condition of the parish, and as he himself said, feeling that the congregation were not in a position to pay \$1,500, his stipend for the next year was reduced to \$1,200. The defendants contended that in order to induce the persons then nominated, one of whom is one of the present wardens, to accept the position of churchwardens, which they were, under the circumstances, very unwilling to do, the plaintiff voluntarily abandoned his claim to the balance then due to him; this, however, was denied.

The plaintiff officiated in the parish until October, 1894, when his resignation was accepted. There was then due, or claimed, the old balance of \$663, and \$312 more in respect of the proportion of the stipend which would be payable for that year.

The action was tried on the 12th of May, 1897, before BOYD, C., who subsequently dismissed it.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 2nd and 3rd of December, 1897.

Clute, Q. C., for the appellant. The alleged relinquishment is not made out, and there is sufficient evidence of an agreement by the defendants: *Maynard v. Gamble* (1863), 13 C. P. 56, 467. Churches organized as this church is have been recognized by the Synod and the defendants cannot escape liability on this ground: 39 Vict. ch. 109, sec. 1 (O.). Neither is it an answer that there are no funds; the plaintiff is entitled to his judgment for what it may be worth: *Frontenac v. Kingston* (1872), 32 U. C. R. 348. [Moss, J.A., referred to *Elderslie v. Paisley* (1884), 8 O. R. 270.]

S. Masson, for the respondents. The plaintiff has not been licensed or properly appointed, but, assuming that his status is made out, he cannot recover, for the defendants are not a corporation and cannot be sued as churchwardens: *Anderson v. Worters* (1882), 32 C. P. 659; *Lloyd v. Burrup* (1868), L. R. 4 Exch. 63. At any rate they have no funds in their hands out of which to pay him, and their liability is to be measured by their receipts.

Clute, Q. C., in reply.

January 11th, 1898. The judgment of the Court was delivered by

OSLER, J.A. :—

It was argued that the churchwardens of a free church in the Diocese of Ontario, are not a corporation within the Church Temporalities Act, 3 Vict. ch. 74, capable of suing and being sued as such. That Act refers only to the electorate or congregation of a pewed church, and it was so decided by the late Sir M. C. Cameron, C. J., in the case of *Anderson v. Worters* (1882), 32 C. P. 659, as regards free churches in the Diocese of Toronto. As to churches in that diocese the difficulty was removed by 47 Vict. ch. 89 (O.), which expressly enacts that churchwardens, whether of pewed or of free churches, in that diocese, besides possessing the powers and authorities conferred upon such churchwardens by any Act of the Legislature then in force, should be a corporation with perpetual succession under the name of "The Churchwardens of the Church of the — in the —" to represent the interests of the church, and with capacity to sue and be sued. On the other hand it was contended that *Anderson v. Worters* was not law, and that at all events by force of the Church Temporalities Act, and of 39 Vict. ch. 109 (O.), relating to the Diocese of Ontario, and of the XXXth canon of the Synod of the Diocese, churchwardens of pewed churches there, were a corporation within the

Argument.

Judgment.

OSLER,
J.A.

meaning of the former Act. An examination of these Acts, and of the canon seemed to me to leave this very doubtful, but there is an Act, which was not referred to by either party on the argument, and for a reference to which I am indebted to the learned Chancellor of the Diocese, Mr. Walkem, Q.C., which removes all difficulty on that score—56 Vict. ch. 110 (O.), (1893)—which enacts that all churchwardens appointed under the provisions of any canon enacted by the Synod of the Incorporated Diocese of Ontario, under the Act 39 Vict. ch. 109 (O.), shall, during their term of office, be *as a corporation* to represent the interests of the church, for which they are elected or appointed, and shall have the status power and responsibilities which, by the Church Temporalities Act, or its amendments, are conferred or imposed upon churchwardens appointed under the provisions of those Acts, etc., etc.

This, however, surmounts only one of the difficulties in the plaintiff's way, because, even though the churchwardens of this church are "as a corporation" and may be sued as such, I have failed to discern any satisfactory ground on which this action can be maintained against them. Assuming also, that the resolutions of the Easter vestries of 1893 and 1894 are evidence of contracts with the plaintiff to pay him a salary at the rate of \$1,500 for the former and \$1,200 for the latter year, yet it is clear that there was no contract to pay these sums absolutely and at all events. The church having been converted from a pewed church into a free church the whole of its revenues were derivable from the voluntary contributions and subscriptions of the congregation. There was no other fund or source of revenue. It is manifest from the plaintiff's own evidence that it was to this source he looked, and that it was upon this he relied for payment of his stipend. He depended upon the ability and goodwill of his congregation to raise the stipend voted by the vestry, and he could only look to the churchwardens to pay him to the extent that they received from the congregation moneys for that purpose. They have no such

moneys in their hands and have never received them. This, at the very highest, is the measure of the defendants' liability as churchwardens under the circumstances.

Judgment.

OSLER,
J.A.

It was argued that on the principle of such cases as *Frontenac v. Kingston* (1872), 32 U. C. R. 348 ; and *Elderslie v. Paisley* (1884), 8 O. R. 270, the plaintiff was at least entitled to a judgment against the churchwardens as a corporation for the amount claimed, leaving him to enforce it hereafter as best he could. But this is a different case. In those cases there was a legal liability. In this there is not. Essentially, it is not very different from *Carry v. Wallace* (1862), 12 C. P. 372.

The plaintiff is deserving of sympathy, for the record shews him to have been a faithful minister, but the position in which he finds himself is one of the hardships too often incident to the voluntary system in a church where there is no endowment and the incumbent's salary is not secured by a personal guarantee.

I am obliged to say that in my opinion the judgment should be affirmed.

Appeal dismissed.

R. S. C.

STEPHENS V. TOWNSHIP OF MOORE.

Drainage—Repairs to Drain—“ Person Injuriouslly Affected ”—Mandamus—Drainage Act, 1894—57 Vict. ch. 56, sec. 73 (O.).

Under section 73 of The Drainage Act, 1894, [57 Vict. ch. 56 (O.)] a ratepayer whose property has been assessed for the maintenance and repair of a drain, as deriving benefit from it, is a person injuriously affected by its want of repair, even though he has not suffered any pecuniary loss or damage by reason thereof, and he may be awarded a mandamus to compel the municipality, whose duty it is to keep the drain in repair, to do such work as may be necessary, unless the municipality can shew that, even if the drain were repaired, it would, from changes in the surrounding conditions, be useless to the applicant's property.

Judgment of the Drainage Referee reversed in part.

Statement.

APPEAL from the judgment of the Drainage Referee.

The appellants were the representatives of one D. T. Stephens, who brought the action and died after the trial. Stephens was a ratepayer of the defendant township, and was the owner of land in the township assessed for the cost of drains constructed therein. He complained that some of the drains had not been kept in proper repair, and claimed damages and a mandamus. The case was tried at great length before the Drainage Referee, who held that though one of the drains in question was out of repair, the plaintiff had suffered no pecuniary damage, and was not entitled to a mandamus.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 15th and 16th of September, 1897. The only question of general interest was whether pecuniary damage had to be made out to justify the granting of a mandamus.

M. Wilson, Q. C., for the appellants.

Aylesworth, Q. C., and *Lister*, Q. C., for the respondents.

January 11th, 1898. OSLER, J. A.:—

At the close of a very full and clear argument by the learned counsel engaged in this case, I formed the opinion, which a subsequent examination of the evidence and

exhibits has confirmed, that the only question which deserved further consideration was whether the judgment of the learned Referee should be so far varied as to award the plaintiff a mandamus requiring the defendants to repair the 4th and 5th concession drain, flowing into the Parr drain from the east, constructed under the by-law of 1872. I quite agree with the Referee that the plaintiff has made out no cause of action in respect of the McGill extension outlet into Bear creek. That was not a piece of drainage work constructed under any of the provisions of the Municipal Act, however reasonable and proper it may have been for the council to make it in carrying out the settlement of their litigation with the late Ezra Stephens. It was made in pursuance of their agreement with him, not for the purpose of benefiting the property of this plaintiff, but for relieving Stephens' lot from waters that might be brought down through the Parr drain from the 2nd and 3rd concessions. As to this branch of the case, upon which the main contest between the parties centred, the plaintiff fails.*

Then as to the non-repair of the 4th and 5th concession drain in front of the plaintiff's lots 5 and 6, I find it quite as difficult, as did the learned Referee, to say that the plaintiff has proved any calculable pecuniary loss or damage attributable to such non-repair and as to this part of the case the judgment must also stand. The claim for a mandamus is in a different position. I do not think it is necessarily bound up with or dependent upon proof that actual damage has been sustained by means of the non-repair. It is the duty of the defendants to keep the drain in repair. The plaintiff is not bound to wait until actual damage has been caused by their default, nor to sue for both modes of relief. His right is to have the drain he has paid for kept in a reasonable state of repair. It was made for the purpose of draining his property, and that of others interested in it, and if the defendants refuse or neglect to repair it, I do not think they can escape from their obligation, or be excused from

Judgment.

OSLER,
J. A.

Judgment.

OSLER,
J.A.

performing it, short of proof that, even if it were repaired, it would, from changes in the surrounding conditions, be entirely useless to the plaintiff's property.

They may, of course, prove on motion before the Referee to set aside the notice, which is a summary method provided by the Act for trying the right, that the notice was given maliciously or vexatiously, or without any just cause, and these would also be grounds of defence to an action; but if the defendants fail to establish them, the plaintiff in my opinion is entitled to say that his property is injuriously affected by the non-repair, and to have the drain put in a proper state of repair. To this extent, therefore, the judgment of the Referee must be varied, and the plaintiff declared entitled to the order for mandamus in accordance with the second branch of the notice given on the 16th of July, 1894.

MACLENNAN, J. A. :—

After a very careful examination of the evidence, I have been unable, notwithstanding all that was urged with great force by Mr. Wilson, to see, with one exception, that the learned Referee came to a wrong conclusion in this case. I agree with him that the plaintiff can not avail himself of the agreement made with his uncle, Ezra Stephens, nor of the bond, in consideration of which that gentleman consented to the dismissal of his motion to quash the by-law of 1872, under which the original drainage works were executed. I am also of opinion that the work done by the council upon the McGill outlet, in pursuance of the agreement with Ezra Stephens, is not a work within the sections of the Municipal Act which the plaintiff can compel the defendants to maintain and repair. I also agree with the learned Referee that the plaintiff has not made out any claim for damages for non-repair of the 2nd and 3rd concession drain eastward to the Dodds' outlet. I think, however, that the right of the plaintiff to a mandamus to compel the repair of that drain is not con-

cluded by that finding. I think there is evidence that although the damage may be merely nominal, the plaintiff is injuriously affected within the meaning of the statute. The plaintiff is entitled to have his land as free from water as that drain in a proper state of repair would make it, whether his land is under cultivation or in a state of nature. If for want of such repair water stands upon his land or any part of it, either in greater quantity or for a longer time than it otherwise would, that is something he is not obliged to submit to, even although it has done him no actual pecuniary damage. It is an injury to a right; for his right is to have it otherwise. I think there is evidence of such an injury, and that the Referee ought to have awarded a mandamus.

Judgment.
 MACLENNAN,
 J.A.

I think to that extent the appeal should succeed, but there should be no costs, and sufficient time should be allowed to the respondents to do the work.

Moss, J. A. :—

Section 583 (2) of the Municipal Act, 1892, 55 Vict. ch. 42 (O.), does not in terms require that in order to entitle a person to give notice and on non-compliance therewith to apply for a mandamus, he should be in a position to establish pecuniary damage resulting from the neglect or refusal.

The words are : “any person * * who is injuriously affected,” not whose property is injuriously affected. The distinction is made in the section itself between the case of a person seeking a mandamus and one seeking in addition the remedy of damages. Under section 583 a person whose property is injuriously affected, is no doubt a person injuriously affected, but it does not follow that a person whose property is not injuriously affected may not be a person injuriously affected. This seems to be made plain by the introduction of the words “or whose property,” in section 73 of the Drainage Act, 1894, 57 Vict. ch. 56 (O.), substituted for section 583 of the Municipal Act, 1892, and now forming section 73 of “The Municipal Drainage Act,” R. S. O. (1897) ch. 226.

Judgment.

Moss,
J.A.

A municipality neglecting or refusing after proper notice to make the necessary repairs is compellable to do so at the instance of a person who is injuriously affected by such neglect or refusal. But in addition it shall be liable in pecuniary damages to any person "who, or whose property, is injuriously affected by reason of such neglect or refusal."

And where pecuniary damage is suffered it may be recovered, although no notice has been given and no case is made for a mandamus, as was held by the Judicial Committee in *Raleigh v. Williams*, [1893] A. C. 540. The cases under the compensation clauses of the English Land Clauses Act, or Railway Clauses Act, do not apply to the section in question here, for, as pointed out in many of them, it seems to follow necessarily from the mere words of the Acts that to entitle any person to compensation there must be injury to land.

It seems therefore that to entitle a person interested to maintain a claim for a mandamus he is not necessarily required to shew that he has suffered tangible pecuniary loss, which is interpreted by Lord Herschell, in *The Greta-Holme*, [1897] A. C., at p. 604, as meaning a definite sum of money out of pocket.

Here it is plain that Stephens was, and the appellants are, interested in the drain in front of lots 5 and 6, and the evidence shews sufficiently, I think, a condition of personal inconvenience, trouble, and drawback in the use and enjoyment by the appellants of the property as a whole, traceable to the want of repair to bring them within the definition of persons injuriously affected. Their strict right, as owners of land assessed for the construction of the drain, is to have the drain maintained in its original condition.

The Referee has found that this has not been done by the defendants. He has also found upon the whole evidence that there has been no pecuniary damage by reason of the neglect or refusal of the defendants, and, therefore, there can be no award of damages against them.

But the right to a mandamus to compel the necessary repairs to the drain in front of lots 5 and 6 is, I think, established. I think the letter of the 16th of July, 1894, was a sufficiently specific demand upon the defendants to make the necessary repairs to the drain in front of lots 5 and 6, without reference to the McGill outlet portion. At all events it was quite open to the defendants to have applied to the Referee, whose jurisdiction is not confined to confirming or setting aside the notice. He has authority to determine what, if any, part of the work shall be done, and to dispose of the costs.

I think that while the Referee properly refused the other relief claimed, he should have awarded a mandamus to compel the defendants to make the necessary repairs to the drain in front of lots 5 and 6. In view of the much larger claim unsuccessfully made, I agree that it was proper that there should be no costs of the action. The appellants have asserted in this appeal their right to the whole relief originally sought, and have only succeeded as to what now appears the least important part. I would give no costs of the appeal to either party.

Judgment.

Moss,
J.A.

BURTON, C. J. O. :—

I agree.

Appeal allowed in part.

R. S. C.

LUFFMAN v. LUFFMAN.

Ship—Sale—Unregistered Lien—Notice—Merchant Shipping Act, 1894—[57-58 Vict. ch. 60, secs. 56, 57 (Imp.)].

While under section 57 of the Merchant Shipping Act, 1894, 57-58 Vict. ch. 60 (Imp.), unregistered equitable interests can be enforced as between the parties immediately affected, the effect of section 56 is that a purchaser from the registered owner takes a title free from unregistered equitable interests even though he has notice of them.

Judgment of ROBERTSON, J., reversed.

Statement. THIS was an appeal by the defendant Shean from the judgment of ROBERTSON, J.

The following statement of the facts is taken from the judgment of MOSS, J.A.:—

The sloop "Gull," which is the subject-matter of this action, is registered as a British ship at the Port of Deseronto, as appears by the certificate of British registry issued by the registrar of shipping at that port to the defendant B. Luffman, and produced at the trial.

In the latter part of 1895 the defendant B. Luffman, being desirous of purchasing the sloop from the then owner, applied to the plaintiff, his mother, to advance him money wherewith to pay for it. The learned trial Judge found that the bargain between the plaintiff and her son, upon which she gave him \$240, was that he was to buy the sloop and she was to have a claim upon it, but if he did not get it he was to bring her back the money. He did get it and the learned Judge at the trial expressed the opinion that the plaintiff was in a position to compel her son to transfer the sloop to her, and that she had a charge or lien upon it to the extent of \$240.

Upon the purchase by B. Luffman a bill of sale was executed in the form prescribed by the Merchant Shipping Act, transferring the sloop to him. The bill of sale and declaration of transfer were no doubt produced to the registrar of shipping at Deseronto, for the name, residence,

and description, of B. Luffman, as owner of the sloop, appear to be entered in the register book. Statement.

Some time in the spring of 1896, the plaintiff became aware of the bill of sale to B. Luffman, but she then took no proceedings, although, according to Edward Luffman, a witness at the trial, she was displeased. Later on, in August 1896, she instructed her solicitor to sue upon the promissory note for \$210 and an account for \$30, representing the \$240 advanced to B. Luffman, and a writ seeking payment of this amount was issued and served on the 8th of August.

On the 15th of August, 1896, the defendant Shean purchased the sloop from B. Luffman for \$125, and by bill of sale of that date, executed in the prescribed form, B. Luffman transferred the sloop to Shean. It is not disputed that Shean paid the purchase money to B. Luffman. The bill of sale was duly entered in the register book on the 18th of August, and an endorsement thereof was made on the certificate of registry by the registrar of shipping at Deseronto.

Judgment in the action for the recovery of the \$240 was obtained against B. Luffman, and on the 22nd of August, 1896, execution against goods and lands was issued and placed in the hands of the sheriff at Napanee.

This action was commenced on the 24th of March, 1897. The learned trial Judge found that the defendant Shean knew when he bought that the plaintiff had a claim of some kind or other, that she had an equitable claim upon the sloop. And he declared that the plaintiff was entitled to a bill of sale from Shean to be held by her as security for the sum of \$240, and interest from the 7th of November, 1895, and ordered Shean to execute such a bill of sale.

The defendant Shean appealed and the appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 2nd of December, 1897.

Wallace Nesbitt, for the appellant. Equities were not recognized under the Merchant Shipping Act of 1854, ex-

Argument. cept as between owner and mortgagee, and notice was of no avail : *Baker v. Dewey* (1869), 15 Gr. 668 ; *Chasteauneuf v. Capeyron* (1882), 7 App. Cas. 127. The present Act, 57 & 58 Vict. ch. 60 (Imp.), is practically the same and must be construed in the same way. The registered owner has full power to sell, and in the absence of actual fraud on the part of the purchaser his title is not affected : *The Horlock* (1877), 2 P. D. 243 ; *Black v. Williams*, [1895] 1 Ch. 408 ; *Hooper v. Gumm* (1867), L. R. 2 Ch. 282 ; *Potter v. Sanders* (1846), 6 Ha. at p. 9 ; *Liverpool Bank v. Turner* (1860), 2 DeG. F. & J. 502.

C. J. Holman, for the respondent. The appellant knew of the plaintiff's claim, and it is enforceable against him : *Prince v. Brady* (1869), 16 Gr. 375 ; *Wood v. Rowcliffe* (1844), 3 Ha. 304.

Wallace Nesbitt, in reply.

January 11th, 1898. OSLER, J.A.:—

The agreement between the plaintiff and the defendant Luffman is not very definite in its terms. At the most it was no more than that the former should have a lien upon the boat for the amount which she had advanced to him to buy it. The boat was not to be bought nor the bill of sale taken in the plaintiff's name. The defendant Luffman was undoubtedly to become the owner, and he did so. Then he sold the boat to the defendant Shean, who bought in good faith in the sense that, so far as appears, neither he nor the defendant Luffman intended to defraud the plaintiff, and he paid his purchase money.

It may be conceded that he had notice that the plaintiff had some equitable claim upon the vessel, and the question is whether as against the defendant Shean, now the registered owner, buying from the registered owner, such claim can be asserted. It might, no doubt, have been enforced against the defendant Luffman while he remained the owner, but it appears to me that the provisions of the Imperial Merchant Shipping Act of 1894,

which came into force on the 1st of January, 1895, and may be found in the volume of the Dominion Statutes of that year, prevent her from setting it up as against his registered vendee. The important sections are 56 and 57; the first is the same as section 43 of the Merchant Shipping Act of 1854, and the second is substantially the same as section 3 of the Merchant Shipping Act of 1862. Section 33 of the Act of 1894 may also be referred to, which is the same as section 69 of the Act of 1854. The effect of these sections is, that a person who acquires the legal title from the registered owner is not affected by an equitable lien or charge previously given, simply by reason of the fact that he bought with notice of such equitable charge. This appears clearly to be the result of the decisions in the two cases of *The Horlock* (1877), 2 P. D. 243, and *Black v. Williams*, [1895] 1 Ch. 408, which quite cover the case before us.

Judgment.

OSLER,
J. A.

I am, therefore, of opinion that we should allow the appeal.

MACLENNAN, J.A. :—

I am of opinion that this appeal should be allowed.

The question depends on sections 56 and 57 of the Merchant Shipping Act of 1894, of which the first is identical with section 43 of the Merchant Shipping Act of 1854, and the other is substantially the same as section 3 of the Act of 1862.

Section 56 enacts that no notice of any trust, express, implied or constructive, shall be entered in the register book, etc., and subject to any rights appearing by the register to be vested in any other person, the registered owner shall have power to dispose absolutely of the ship or share, and to give effectual receipts for the consideration. And section 57 says that without prejudice to the provisions of the Act for preventing notice of trusts from being entered in the register book, and without prejudice to the powers of disposition, and of giving receipts, conferred by the

Judgment. Act on registered owners and mortgagees, etc., interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interests therein, in the same manner as in respect of any other personal property.

MACLENNAN,
J.A.

The effect of these two sections is well stated, in Maclachlan on Shipping, to be that as between the immediate parties to an equitable interest, the existence of the register is no obstacle to the enforcement of such interest, and the protection of the parties in the rights which have been *bonâ fide* acquired by them.

The defendant Luffman was the registered owner of this vessel, and by the very words of section 56 he had power to dispose of it absolutely, and to give a discharge for the purchase money, and his power to do so is subject only to any rights, vested in any other person, appearing on the register. That in terms excludes the effect of any rights not appearing on the register. Then, while section 57 recognizes equitable rights, they are only to be enforced without prejudice to the powers of disposition and giving receipts given by section 56. While, therefore, before and until Luffman had made his bill of sale to Shean the plaintiff could have enforced against her son any equitable right she had against the vessel, and have compelled him to do what that right required of him, she has no right to set aside or reduce the bill of sale which he made to Shean for valuable consideration: see *Black v. Williams*, [1895] 1 Ch. 408, 417, for an exposition of two of the corresponding sections of the Act which relate to mortgages.

Moss, J.A. :—

The learned trial Judge seems to have been of the impression that upon a bargain between the plaintiff and B. Luffman being established under which she could claim as against him to be entitled to a charge or lien upon the sloop, and upon its being shewn that Shean had notice of

some equitable right in the plaintiff, she was entitled to judgment against the latter. I do not think the authorities support this view of the rights of these parties.

Judgment.

Moss,
J.A.

The case is governed by the provisions of the Merchant Shipping Act, 1894 (Imp.), which came into force on the 1st of January, 1895.

It may be conceded that if the defendant B. Luffman still continued to be the registered owner the plaintiff could enforce against him the equity which the judgment declares her entitled to as against Shean. That is the effect of section 57 of the Merchant Shipping Act, 1894. This section was formerly section 3 of the Merchant Shipping Act Amendment Act, 1862.

It was originally passed to correct the ruling that the Courts could in no case, even as between immediate parties, recognize equitable titles to British ships. But it left unaffected the authorities dealing with the position of a transferee. It had formerly been determined upon grounds of public policy that, having regard to section 43 of the Merchant Shipping Act, 1854, a purchaser from the registered owner, to whom a bill of sale was duly executed and registered as required by the Act, might hold the title notwithstanding notice of trusts or rights not appearing by the register.

These decisions were not affected by the enactment of section 3 of the Merchant Shipping Act Amendment Act, 1862: *Black v. Williams*, [1895] 1 Ch. 408. The policy which dictated them was founded on the view that it was for the benefit of commerce that English ships might be easily dealt with by English shipowners, that it was to the interest of the whole community that people should be able to raise money on ships by sale or mortgage.

Whether these considerations ought to apply as forcibly to vessels navigating our inland waters, as to ships on the high seas, need not be made matter of speculation, for certainly it would not be proper that in any part of the Empire a construction should be placed upon an Imperial statute different to that given by the English Courts.

Judgment.

Moss,
J.A.

In this case there is difficulty upon the testimony in ascertaining the exact nature of the transaction between the plaintiff and B. Luffman. But whether it was an agreement by the latter to execute to the plaintiff a bill of sale by way of mortgage to secure the \$240, or to make or procure to be made to her an absolute bill of sale to be held by her as a security until the \$240 were repaid, it was not intended that she should be the absolute owner of the sloop.

At the most she had but an equitable title which, up to the time of Shean's purchase, she had not thought fit to convert into legal form and register in manner prescribed by the statute.

Fraud on the part of B. Luffman has not been found, but, assuming it as against him, notice thereof to Shean has not been found or established by the evidence: *The Horlock* (1877), 2 P. D. 243.

As between the plaintiff and B. Luffman the existence of the register was probably no obstacle to the enforcement of such an interest as she is found to have had, but when Shean purchased from B. Luffman, the registered owner, and by compliance with the requirements of the Act became the registered owner, the plaintiff lost her rights as against the sloop.

Many of the earlier decisions are to be found in the case of *Baker v. Dewey* (1869), 15 Gr. 668.

The appeal ought to be allowed and the action dismissed with costs.

BURTON, C.J.O.:—

I agree.

Appeal allowed.

R. S. C.

COLL V. TORONTO RAILWAY COMPANY.

Master and Servant—Damages—Tort—Wrongful Act of Servant—Scope of Employment.

A master is not liable for the wrongful act of a servant, though intended to promote the master's interest, if it is an act outside the scope of the servant's employment and authority, and is one which the master himself could not legally do.

The defendants were held not liable where the motorman of one of their electric cars, who had no control over or authority to interfere with passengers or persons on the cars, pushed off the car, as the jury found, a newsboy who was getting on to sell a paper to a passenger.

Judgment of ROBERTSON, J., reversed.

THIS was an appeal by the defendants from the judgment of ROBERTSON, J. Statement.

The following statement of the facts is taken from the judgment of OSLER, J. A. :—

This was an action brought by the plaintiff Dennis Coll, by his father and next friend, against the Toronto Railway Company for injuries sustained by him in consequence of being pushed or thrown from one of the defendants' cars while in motion. The statement of claim alleged that the plaintiff, while pursuing his daily occupation of selling newspapers, was called by a passenger on one of the defendants' street cars; that while in the act of boarding the car to serve the customer who called him, he was, through the carelessness, negligence and wrongful and improper act of the defendants and their servant, thrown or pushed off the car while it was in motion and permanently injured.

The case was tried before Robertson, J., with a jury. On the main point the evidence was conflicting. For the plaintiff it was sworn that having been signalled by a passenger on the car for a newspaper he ran after it or towards it, the car being then in motion going south; that he got both feet on the lowest step in front of the car, having also taken hold of the brass handle or upright, and was then pushed or shoved off the car by the motorman; and

Statement. that in falling his right foot was caught by the wheel and pushed along the rail and injured. For the defence it was sworn that the motorman had not touched the plaintiff but had merely told him to keep off and had raised his hand at him, and that the plaintiff fell off the step or did not succeed in getting a foothold. As to the motorman's duties it was proved that there was a conductor and a motorman on every car; that between them they "ran" or controlled it; that the motorman had nothing to do with passengers except to open the door for them when necessary when they got in at the front end and to notify the conductor by ringing the bell. If a passenger became unruly or a nuisance the conductor might call the motorman to his assistance. The superintendent of the company said that newsboys had been allowed to get on and off the cars—tacitly permitted, as it may be inferred, to do so—not as passengers but in pursuit of their ordinary employment.

The defendants contended at the trial that the action should be dismissed on the ground that even if the motorman had pushed the plaintiff off the car such an act could not in any sense be said to have been within the scope of his authority or in the course of his employment and they were not liable therefor. The objection was overruled and the case appears to have been left to the jury on the question of fact whether the motorman had or had not pushed the boy off. They were told that if they believed the evidence for the plaintiff he was entitled to recover.

The learned Judge's charge, in which the evidence was very carefully presented to the jury, was rather favourable to the defendants, but the jury found in favour of the plaintiff Dennis Coll for \$500, and for his father and next friend for \$103 for doctor's bill, expenses of nurse and loss of boy's time. No objection was raised as to the form of the action or as to the father's right to recover, and judgment was given for the plaintiff in accordance with the verdict.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 1st of October, 1897.

J. Bicknell, for the appellants. The accident could not have happened in the manner alleged by the plaintiff, and the verdict should be disregarded. At any rate the defendants are not responsible for the misconduct in the manner charged of the motorman. His duty is to look after the power, and to stop and go on when directed, and he has nothing to do with keeping persons from getting on the car, or with putting them off. That is the conductor's duty. It is not necessary for the efficient running of the car that the motorman should have power of this kind, and this is the test: *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270, at p. 288. The case would be different if the conductor had ordered the motorman to put the boy off: *Marion v. Chicago etc. R. W. Co.* (1882), 59 Iowa 428, and see *Pittsburg etc. R. W. Co. v. Donahue* (1873), 70 Pa. St. 119; *Stedman v. Baker* (1896), 12 Times L. R. 451; *Abrahams v. Deakin*, [1891] 1 Q. B. 516; *Richards v. West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660. The defendants would have had no right to do the act here complained of, therefore their servant could have no implied authority: *Poulton v. London and South-Western R. W. Co.* (1867), L. R. 2 Q. B. 534; *Emerson v. Niagara Navigation Co.* (1883), 2 O. R. 528.

Aylesworth, Q. C., and *L. V. McBrady*, for the respondent. The jury having found for the plaintiff on a charge not objected to by the defendants, their finding cannot be disturbed. The appellants' argument is beside the facts. The motorman's responsibility and duty are much greater than is contended. Clearly the motorman has the implied duty to preserve the property of the company, and to do what he can to help the conductor to take care of passengers or keep order, and here the intention admittedly was to keep off the car the boy who was attempting to get on, not as a passenger, but to the possible annoyance of passengers, or to the possible injury of the car, and also to prevent the possible injury to his master's interests from the boy being hurt in getting on a moving car. The principle of *Limpus v. London General Omnibus Co.* (1862),

Argument. 1 H. & C. 526, applies. See also *Engelhart v. Farrant*, [1897] 1 Q. B. 240; *Ferguson v. Roblin* (1888), 17 O. R. 167; *Kansas City R. W. Co. v. Kelly* (1887), 36 Kan. 655; *Carter v. Louisville R. W. Co.* (1884), 22 Am. & Eng. R. W. Cas. 360, 98 Ind. 552; *Biddle v. Hestonville, etc., R. W. Co.* (1886), 26 Am. & Eng. R. W. Cas. 208.
J. Bicknell, in reply.

January 11th, 1898. BURTON, C. J. O.:—

This was an action brought by an infant, a newsboy, to recover damages against the Toronto Railway Company for injuries which he alleged he had sustained by reason of his being shoved or thrown off the car, when endeavouring to enter it, by the defendants' servant, who filled at the time the position of motorman.

There was a conflict of evidence as to whether the motorman did anything more than warn the plaintiff not to attempt to get upon the car when in motion, or whether the injury was not the result of the boy's own negligence in making that attempt, but assuming that the claim is made out, as we must now do upon the finding of the jury, the question still arises whether the defendants are the parties liable, and this must depend upon whether the motorman was acting within the scope of his employment; if he was, then the rule is clear that the defendants would be liable even though the wrongful act was the very reverse of what by his instructions he was directed to do.

It is contended that the question of whether the act was within the scope of the defendants' employment was a question of fact and had been passed upon by the jury, but the answer to that is, in my opinion, that there was no evidence to support such a finding; the evidence upon that point was that of Mr. Gunn, and, so far from supporting such a finding, is all the other way. Asked, whether it was his duty to look after the passengers getting on at the front end of the car, he answered: No; he has not anything to do with the passengers; he rings the bell to notify the conductor that the passenger has got on.

He has, according to Mr. Gunn's evidence, nothing to do even with unruly passengers unless called upon to do so by the conductor.

Judgment.

BURTON,
C.J.O.

If not within the ordinary scope of his employment the fact that he was acting in what he conceived to be the interest of the company becomes unimportant, or as expressed in one case, "where the employee is not acting within the course of his employment, the employer is not liable even for the employee's negligence, and the mere purpose of the employee to serve his employer has no tendency to bring the act within the course of his employment": *Marion v. Chicago etc. R. W. Co.* (1882), 59 Iowa 428. See also *Richards v. West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660.

I think, therefore, with great deference, that there was no evidence for the jury that what was done here was within the scope of the motorman's employment, and that the action against the company is not maintainable.

In this view it is not necessary to express any opinion as to this boy being a passenger, although I am compelled to differ from the learned trial Judge upon this point. It is clear upon the evidence that this boy was not entering the car with the view or for the purpose of being carried as a passenger; he was proposing, as appears from his own evidence, to go upon the car for the purpose of supplying a paper to a passenger, and such a boy, but for the tacit understanding under which those boys had previously been allowed to get upon the cars, would have been a trespasser, and he was at most a licensee, a relation which the company were entitled to put an end to at any time, and which I understand they have since this action terminated. It is beside the matter to say that until his fare was demanded he was entitled to remain on the car; that is not so, unless he was there for the purpose of being carried. I do not, of course, mean that that would have justified the conductor in removing him in a reckless manner, but I have no doubt it was in the power of the conductor to remove him.

Judgment. I think that the action is not maintainable against the
BURTON, company, and that the appeal should be allowed.
C.J.O.

OSLER, J. A. :—

Cases of this kind frequently give rise to nice questions as to whether on the particular state of facts the servant's act can be said to have been in the course of his employment, or as it is sometimes expressed, within the scope of his authority. The present case seems to be comparatively free from difficulty. The duties of the motorman were to manage his motor in running and stopping the car. He had no control over or authority to regulate passengers or others lawfully upon the car, except in so far as he might be called upon by the conductor to assist him in the case of a passenger becoming a nuisance. The passage so frequently cited from the judgment of Willes, J., in *Bayley v. Manchester R. W. Co.* (1872), L. R. 7 C. P. 415, is the touchstone by which to try the question as the evidence presents it here: "A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of his employment."

In that case a porter of the defendants, acting under rules, was expressly directed to prevent persons, if possible, from travelling in the wrong carriage. He removed the plaintiff violently from the carriage in which he was sitting, under the erroneous impression that he was not in the right train for the place to which he had been booked.

In *Seymour v. Greenwood* (1861), 6 H. & N. 359 the guard of the defendants' omnibus forcibly dragged out

a passenger and threw him on the ground under the mistaken belief that he was drunk. It was not denied that the defendants had authorized the guard to superintend the conduct of the omnibus generally, and that such authority must be taken to include an authority to remove any passenger who misconducted himself.

Judgment.

OSLER,
J.A.

In *Smith v. North Metropolitan Tramways Co.* (1891), 7 Times L. R. 459, 55 J. P. 630, a dispute had arisen between the conductor of one of the defendants' tram cars and the plaintiff, a passenger, as to payment of the fare. The conductor seized the plaintiff and put him off the car. It was clear, as the Master of the Rolls said in delivering judgment, that a conductor would be acting in the ordinary course of his employment if he removed from the car a person who refused to pay his fare. See also *Philadelphia Traction Co. v. Orbann* (1888), 119 Pa. St. 37.

In all these cases the defendants were held liable on the principle expressed in the passage above cited. What their officers did, though wrongly or mistakenly done, was within the scope of their authority.

In the case at bar the motorman is shewn to have had no authority to remove passengers or others and therefore his act in pushing the plaintiff off the car was not of a class of acts entrusted to his discretion to perform, and so not an act done in the excessive or erroneous execution of a lawful authority as in the cases above cited.

Nor is this case within that class of cases of which *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526; *Dyer v. Munday*, [1895] 1 Q. B. 742; *Ferguson v. Roblin* (1888), 17 O. R. 167, are illustrations, where the servant has committed some wilful wrong in the course of the master's employment and for his benefit.

In the first of these cases the defendants' driver drove his omnibus not merely so as to obstruct the omnibus of a rival company, but also, as it was held it might be properly inferred, for the purpose of getting before, and thus for the purpose of doing his master's business in rivalry with, other omnibuses on the road.

Judgment.

OSLER,
J.A.

The others are cases of assaults committed by a servant while taking possession of and removing furniture held under a hire receipt and in the course of, and for the purpose of, enforcing his attempt to do so.

In such cases the acts of the servant, though wilful and unauthorized, were nevertheless done in the course of the employment and for the purpose of serving the employer, who must answer for the misconduct of the person whom he has intrusted with his business. *Richards v. West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660, a case somewhat similar to the last two, is distinguishable precisely on the ground that the assault committed by the defendants' broker, after he had entered the plaintiff's premises for the purpose of distraining, was entirely unconnected with the distress and therefore not done in the course of his employment. The distinction is well expressed in *Marion v. Chicago etc. R. W. Co.* (1882), 59 Iowa 428: "The rule is that an employer is not liable for a wilful injury done by an employee, though done while in the course of his employment, unless the employee's purpose was to serve his employer by the wilful act. Where the employee is not acting within the scope of his employment, the employer is not liable even for the employee's negligence, and the mere purpose of the employee to serve his employer has no tendency to bring the act within the course of his employment."

In the present case the motorman's act was not within the scope of his employment, nor is it easy to see how it can in any view be said to have been intended for the defendants' benefit, assuming that it was ever really done at all.

I refer also to *Gillson v. London and India Docks* (1892), 8 Times L. R. 702; *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270; *Stedman v. Baker* (1896), 12 Times L. R. 451; *Abrahams v. Deakin*, [1891] 1 Q. B. 516; *Goddard v. Grand Trunk R. W. Co.* (1869), 57 Me. 202; *Ramsden v. Boston etc. R. W. Co.* (1870), 104 Mass. 117.

The case of *Emerson v. Niagara Navigation Co.* (1883), 2 O. R. 528, calls for no observation here.

Judgment.

OSLER,
J.A.

I think that the appeal should be allowed.

MACLENNAN, J. A. :—

The jury must be taken to have found that the motor-man pushed the plaintiff off after he had effected a lodgement upon the steps of the car, with the result that his foot was injured by the wheels; and the question is, whether the company is liable. The plaintiff was a trespasser. There is no general right or invitation to enter or go upon, the defendants' cars, except for the purpose of carriage on payment of fare. The plaintiff's purpose was, not to be carried as a passenger, but to sell a newspaper. He had no legal right to do that. The company, however, was not in the habit of preventing newsboys from entering the cars, or of putting them off, but tolerated their doing so. Even the conductors had no instructions to prevent them from entering, or to put them off. To permit the plaintiff to enter could be no harm or injury to the company; to keep him off, or to put him off, no advantage. To permit or to hinder was indifferent to the business or interest of the company. The conductor alone, according to the undisputed evidence, had authority to remove him, but even he could only do so gently, and after stopping the car, and after requesting him to go: *Polkinhorn v. Wright* (1845), 8 Q. B. 197. The case which was most relied upon for the plaintiff was *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526, where the defendants' driver drove in such a way as to cause the overturning of a rival omnibus. In that case the defendants were held liable, the act of the driver having been in the course of his employment, and within the scope of his authority, and intended for the benefit and advantage of his employers. The present case is quite different. The act in question was done in the course of the motorman's employment, no doubt, but it was no

Judgment. part of his duty to determine who should, or should not, come upon the cars, or to hinder anyone from coming or remaining upon them. That duty rested with the conductor. It is not sufficient that a person in the employment of another do an act in the course of the employment, and intended to promote his employer's interest. If the act be one which the employer himself could not legally do, or if it be an act without the scope of the servant's employment or authority, then the employer is not responsible: Addison on Torts, 6th ed., p. 107 *et seq.*; *Abrahams v. Deakin*, [1891] 1 Q. B. 516; *Stedman v. Baker* (1896), 12 Times L. R. 451; *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270. I think that upon the undisputed evidence this case is one of the latter kind, and that the case should have been withdrawn from the jury. I feel bound to say that I share the impression which the evidence made upon the mind of the learned Judge, that the motorman's account of what occurred was the true one.

I think that the appeal ought to be allowed, and that the action should be dismissed.

Moss, J. A. :—

I agree in the result.

*Appeal allowed.**

R. S. C.

* See *Knight v. North Metropolitan Tramways Co.* (1898), 14 Times L. R. 286.—REP.

IN RE CANADIAN PACIFIC RAILWAY COMPANY AND COUNTY
AND TOWNSHIP OF YORK.

Railways—Highways—Crossings—Maintenance of Gates—Apportionment of Cost—Constitutional Law—Railway Committee—Railway Act, 1888—51 Vict. ch. 29, secs. 11, 187, 188.

The Railway Committee of the Privy Council, on the application of the city of Toronto, ordered the Canadian Pacific Railway Company to put up gates and keep a watchman where the line of railway crossed a highway running from the city of Toronto into the township of York, the line of railway being at the place in question the boundary between the two municipalities, and ordered the cost of maintenance to be paid in equal proportions by the railway company, and the city.

On a subsequent application by the city representing that the township was equally interested and asking for contribution from the township, the township brought in the county, and an order was made by the Railway Committee that the county and township should contribute in certain proportions :—

Held, per BURTON, C.J.O., and MACLENNAN, J.A.: That, assuming the validity of legislation conferring jurisdiction on the Railway Committee, their powers were limited to persons or municipalities invoking the exercise of their jurisdiction, and that their order was invalid so far as it imposed a burden upon the township and county.

Per OSLER, J.A.: That the legislation was *intra vires*, and that the township and county were persons interested within the meaning of the Act, and subject to the jurisdiction of the Railway Committee.

Per MEREDITH, J.: That the legislation was *intra vires*, but that the county was not a person interested, not being under any responsibility for the maintenance of the highway in question.

Per Curiam: That the decision of the Railway Committee upon a subject, and in respect of persons, within its jurisdiction, cannot be reviewed or interfered with by the Court.

In the result the judgment of ROSE, J., 27 O. R. 559, was allowed as to the county of York, and dismissed as to the township of York.

THESE were appeals by the county of York and township of York from the judgment of ROSE, J., reported 27 O. R. 559, and were argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ. A., and MEREDITH, J., on the 7th of October, 1897.

Statement.

The facts and arguments are stated in the report below and in the judgments in this Court.

Aylesworth, Q. C., for the appellants the township of York.

C. C. Robinson, for the appellants the county of York.

Robinson, Q. C., and *A. MacMurchy*, for the respondents.

J. R. Cartwright, Q. C., for the Attorney-General for Ontario.

Judgment. January 11th, 1898. BURTON, C. J. O. :—

BURTON,
C.J.O.

These were appeals from a judgment of Mr. Justice Rose, arising out of a special case agreed upon between the parties for the purpose of determining the liability of the township of York and the county of York, respectively, to contribute to the expense of the watchmen and gates ordered to be provided by the Canadian Pacific Railway at the crossings by their railway of Dufferin and Bathurst streets.

It would seem that on the 8th of January, 1891, the Railway Committee of the Privy Council, upon the application of the city of Toronto, made an order (purporting to be made in pursuance of the authority vested in them by the 187th and 188th sections of the Railway Act of 1888), that for the protection at the crossings of the streets in question gates and watchmen be provided within two months from the making of the order, and be thereafter maintained by the Canadian Pacific Railway.

So far the power of the Railway Committee cannot, I suppose, be questioned; and the further order that the cost attending the placing and maintenance of the gates and watchmen at the crossings should be borne one-half by the railway, and the other half by the municipality of Toronto, may perhaps be justified on the ground that the application of the city was granted only on that condition, and thus became in effect a matter of agreement between the parties.

But the difficulty arises under the further order made on the 16th of December, 1893, by the Committee, again on the application of the city, who represented that the township of York was equally interested with themselves in having protection provided at these crossings, and prayed that they might be made to contribute to the cost, whereupon the township, whilst protesting against the jurisdiction of the Committee, claimed that the county and not the township should be called on to contribute.

The Committee thereupon made the order now complained of, directing that the township and county, as well

as the city of Toronto, should pay a proportionate amount, that is to say: the city of Toronto two-thirds of the one-half, and the township and county one-third, the sum payable by the railway being left as before.

Judgment.

BURTON,
C.J.O

The contention on the part of the township and of the county is that, assuming the right of the Committee to impose such an obligation on a municipality or person who applies to the Committee for such protection, and thereby submits, so to speak, to the jurisdiction of the Committee, it has no authority to impose an obligation upon any person or municipality that has not so applied, and that at all events the power is confined to apportioning the cost between the railway company and the municipality, or person applying.

That has been done by the previous order, one-half being the proportion to be paid by the railway, and one-half by the city of Toronto.

The city now contends that a proportion of the amount so directed to be borne by it should be borne by the township, and that is the matter in dispute between it and the township, whilst the township says if it is liable the county should contribute some proportion, and that is the dispute between it and the county. It is a matter of indifference to the railway which of these contentions is correct, as the solution does not affect its contribution, which still remains at one-half of the whole cost.

That appears to me to be well founded. The powers of the Railway Committee of the Privy Council are defined by section 11 of the General Railway Act, 51 Vict. ch. 29 (D.), and are confined, speaking generally, to matters relating to the internal management and operation of the railway, and to applications, complaints, or disputes, arising between the company and other railways or in relation to the construction of its line upon, along or across, highways, also traffic arrangements, and generally in reference to any act, matter or thing, which by the general Act or any special Act is sanctioned, required to be done, or prohibited.

Our attention upon the argument was specially drawn

Judgment. to sub-sections (i) and (j) of section 11 of 51 Vict. ch. 29
BURTON, (D.), as having a bearing upon the question now in dispute.
C.J.O.

It is not easy at first to understand the precise meaning of sub-section (i) and it is necessary to refer to the past history of railways, formerly under the jurisdiction of the Provincial Legislature.

Under the General Railway Act of the Province, R. S. O. (1877) ch. 165, sec. 22, railway companies were bound to fence their railways and the approaches to any crossing at their own expense, no portion of the cost being borne by the municipality.

On the 19th of April, 1884, the Dominion Parliament passed an Act applying to all railways within its legislative authority, and among other provisions reversed the policy previously adopted in Ontario and enacted that as regards railways under construction or already constructed the Railway Committee of the Privy Council should determine the proportion in which the cost of providing such fencing for highway approaches should be borne by the railway company or person interested.

My understanding, therefore, of section 186, and of sub-section (i) of section 11, in reference to such railways, even though constructed under provincial charter, if subsequently declared to be a work for the general advantage of Canada, is that if fencing should be thereafter required in connection with approaches they should be placed as nearly as possible on the same footing as roads constructed under the general law of the Dominion. Whatever its meaning, however, it has no application to the case we are considering, being confined to the case of fencing the approaches to a crossing, but sub-section (j) and section 187 do bear directly upon the point, unless sufficient effect is given to the language of the statute by confining it, as already suggested, to cases in which a municipality or person have shewn themselves to be interested by making an application for the protection sought, or to a case in which a municipality is laying out a new highway across the railway, and where, therefore, the

cost might very properly be borne entirely by the municipality, and in either of which cases the permission might be granted on such terms and conditions as might be deemed reasonable by the Committee.

The present legislation of the Dominion provides that whenever a railway crosses a highway the company are obliged to submit a plan and profile to the Railway Committee, who may require the company to protect such street or highway by a watchman, or by a watchman and gates, or other protection, or to carry such street or highway either over or under the railway by means of a bridge or to execute such other works as may appear to the Railway Committee best adapted for removing or diminishing the danger arising from the position of the railway; and it then provides that the Railway Committee may make such orders and give such directions respecting such works and the apportionment of the costs thereof and of any such measures of protection between the said company and any person interested therein as appear to them to be just and reasonable.

I do not well understand how these two municipalities can be held to be persons interested, giving the widest interpretation to the word "person," unless they have shewn their interest by making an application to the Railway Committee for protection. The county is not even interested in the road in any way and many of its ratepayers are residing miles away from it and never use it, and although the road is within the limits of the township and under its control its responsibilities are confined to keeping it in repair.

It may be necessary, therefore, in this connection to consider a question, which I would rather avoid doing, in reference to the jurisdiction of the Dominion Parliament to pass the sections of the Railway Act above referred to, if they are supposed to confer the power now claimed under the order of the Railway Committee to impose a tax upon a municipality *in invitum* for the construction of the works mentioned therein.

Judgment.

BURTON,
C.J.O.

Judgment.

BURTON,
C.J.O.

The learned Judge below has assumed that the Railway Committee has the power and upon that assumption I concede at once that their decision is final and conclusive and is not reviewable by the Courts.

The railway in question is one of the subjects placed under the exclusive jurisdiction of the Parliament of the Dominion, and it follows that in all matters affecting its construction, operation, and management, including the expropriation of the lands required, everything in fact necessary to its full and efficient working, the legislation of the Dominion is of paramount authority even though it interferes with property and civil rights and trenches upon matters assigned to the Provincial Legislature by section 92 of the British North America Act. To hold otherwise would be to render nugatory very many of the powers specially assigned to the Dominion Parliament, and so far as the legislation of that body is necessarily incidental to the exercise of the powers conferred upon the railway, and to the extent necessary to accomplish the objects for which it was incorporated, I agree that full effect should be given to it.

Until the passage of the Railway Act of 1888, everything connected with the construction and management and operation of railways, including such provisions as were necessary for the protection of the public at crossings, were to be borne by the companies who were operating them, and it would strike one as properly so as they were operating them for their own profit and advantage. The change, if by it it is intended to impose a charge for the first time upon a municipality or individuals not seeking special protection, is a great innovation, and it may well be questioned whether such a power can be exercised by Parliament. There can be no doubt that they have exclusive power to direct the railway to do whatever may be necessary to protect the public, but that is a very different thing from directing an individual or a municipality, who are under the jurisdiction of the local Legislature, to take these measures, and it appears to me that there is a difference only

in degree. It is a very serious question. It may be that in the exercise of their powers Parliament might relieve the railway company from the obligation at present existing to fence their railway, but does it follow that they could impose the obligation of fencing upon the municipality, or the owners of the land, through which it passes. It is not necessary, I think, to decide this question and I refer to it only in support of the view I have expressed that it was perhaps the intention of the Dominion Parliament to confer the power on the Railway Committee of the Privy Council in those cases only in which the municipality or person has shewn itself or himself interested by making an application to them for protection, or is asking for permission to cross the railway, or to cases of disputes between the railway company and some one else, and that in this case, in which the railway is not interested but in which the city of Toronto seeks to make other parties contribute to a liability which it has voluntarily assumed, there is no jurisdiction and the order cannot be enforced.

I think, therefore, with great submission that the appeals should be allowed with costs here and in the Court below.

Judgment.

BURTON,
C.J.O.

OSLER, J. A. :—

I would affirm the judgment, and substantially for the reasons given by my learned brother Rose. The two orders of the Railway Committee of the 8th of January, 1891, and 16th of December, 1893, must be read together as one order dealing with the whole subject of these crossings, and they appear to me to be within the powers which sections 11 (i), (j), 18, 19, 187 and 188 of the Railway Act, 51 Vict. ch. 29 (D.), purport to confer upon the Railway Committee. It was but faintly argued that the order of the 8th of January, 1891, made upon the application of the city of Toronto, was not so, but it was contended that there was no power to bring in the township and county subsequently, and to make a different apportionment of the cost, and it was said that no order could be made except against some

Judgment,
OSLER,
J.A.

party who had invoked the powers of the Railway Committee. I cannot think that we should be justified in placing so narrow a construction upon these sections. The mode in which the action of the Railway Committee is to be brought about is not prescribed. They have power to direct the execution of the works, and as they have also power to direct the apportionment of the cost, they must have power to bring before them parties alleged to be interested in the works and measures of protection by which it is occasioned, or at all events to give such parties an opportunity of being heard on the subject before any determination is arrived at. I think the township and county ought to have been brought in on the first application on the suggestion of the city, and as the Railway Committee have power under section 18 to review and rescind or vary any decision or order previously made by them, it follows, I think, that they were properly brought in on the subsequent application. Then they did come in and evidence was given, and their case argued by counsel before the Railway Committee so that nothing has been done *in absentia*.

On the question whether these provisions of the Railway Act are *ultra vires* of Parliament, in relation to the three municipalities or otherwise, I have little to add to what I said on the general question in *McArthur v. Northern and Pacific Junction R.W. Co.* (1890), 17 A. R., at pp. 124, 125. As provisions relating to the safety of the public in connection with the management of a great Dominion undertaking they would appear to be eminently germane, if not absolutely necessary, to legislation on such a subject, and cannot be held to be invalid merely because, in the mode in which Parliament has declared they shall be carried out, they to some extent affect property and civil rights. It cannot but be considered reasonable and right that the public, as represented by the municipalities through which the road passes, sharing in the advantages conferred by it and directly benefited by the measures of protection imposed and required, should share also in the cost of maintaining them. Legis-

lation by which such liability may be imposed seems to me not essentially different—regarded as legislation relating to the railway—from that under which the road is created, and the compulsory acquisition of land, and the ascertainment of its price or value, provided for, *e.g.*, the cases of fencing and subtracting benefit derived from increased value of remaining land. It is not, in my opinion, *ultra vires*, and if not, I agree that the Court cannot review the decision of the Railway Committee and declare that those whom they have decided to be interested in and liable to contribute to the cost of maintenance are not interested and liable. It was argued that if the county or township could be treated as interested the Railway Committee might as well declare that any other municipality in the Province, even the most distant, might also be so held, but I do not think that questions of *ultra vires* can be tested or decided by unreasonable or extravagant suppositions of that kind. It must be assumed that the Railway Committee will exercise the judicial powers which have been entrusted to it in a just and reasonable manner, and there is no reason to say that even as regards the county it has here acted otherwise. Many of the matters urged on the appeal, relating to the status of municipalities, their powers of taxation, etc., are really merely assertions in various forms of the principal objection, for if the legislation is *intra vires*, municipal corporations are in no different position from natural persons, and there is no more difficulty in enforcing compliance with the order of the Railway Committee than in enforcing a judgment obtained against them in an ordinary action.

I think that the appeals of the township and county should be dismissed with costs.

MACLENNAN, J. A. :—

These appeals depend on the proper construction of several sections of the Railway Act of Canada, 51 Vict. ch. 29 (D.), relating to the powers of the Railway Committee of

Judgment.

OSLER,
J.A.

Judgment. the Privy Council, and particularly of section 11, sub-sections (i) and (j), and of sections 183 to 190 inclusive.
MACLENNAN,
J.A.

The southern limit of the railway at the crossings in question is the boundary line between the city of Toronto and the township of York, and also the boundary between the city and the county of York, so that while the railway at those points abuts upon the city it lies wholly within the township and county. In 1891, on the application of Toronto, an order was made by the Railway Committee that gates and watchmen should be provided and maintained at those crossings by the railway company, and that the municipality or municipalities interested should contribute one-half of the cost. In 1893, the Railway Committee, also upon the application of the city of Toronto, apportioned the cost of the placing and maintenance of the gates and watchmen between the company and the municipalities by requiring the township and county each to contribute one-twelfth thereof. The question is whether the order is valid so far as the township and county are concerned. The authority which is relied on for this order is sections 187 and 188. Section 187, after requiring the company, whenever the railway crosses or is to cross any street or other public highway, to submit a plan and profile of that portion of the line to the Railway Committee for its approval, authorizes the Committee from time to time to require the company to protect the street or highway by a watchman, or by a watchman and gates, or other protection, or to execute such other works as may appear to the Committee to be best adapted for removing or diminishing the danger arising from the position of the railway; and section 188 then enacts that the Committee may make such orders, and give such directions, respecting such works and the execution thereof, and the apportionment of the costs thereof, and of any such measures of protection, between the company and any person interested therein, as appear to the Committee to be just and reasonable. Section 189 then imposes a penalty of \$50 a day upon the company for delay in the completion of the

works of protection. It will be observed that there is not in these clauses any mention of contribution by municipalities. The words which are used are "person interested." It is contended that "person," upon a proper construction of the section, does not include municipalities. But by section 7 (22) of the Interpretation Act, R. S. C. ch. 1, the word "person" includes any body corporate and politic to which the context can apply, and I therefore think the word "person" in section 188 is to be interpreted as including municipalities. I think this conclusion is assisted by the actual mention of municipalities in the similar clauses relating to fencing of the approaches to crossings in section 11, sub-section (i), and in section 186.

What then is the meaning of the expression person or municipality interested therein? The company contends that it means the municipalities within which, or adjacent to which, the crossing in question lies, and therefore in the present case that it includes the city, and also the township, and county, of York. It is not mentioned in the case, but it was conceded on the argument, that these streets were public highways at the time, and long before, the railway was constructed; and if the construction of the Act contended for is to prevail, it means that authority is thereby conferred upon the Railway Committee to enable the company to levy a tax upon municipalities for the construction and maintenance of works necessary to protect the public from danger and injury by the running of trains. It may be that Parliament could authorize the railways to levy contributions from municipalities and landowners generally for the construction and maintenance of their lines and other works. If it could, it is not likely that the power would be exercised, unless under some very extraordinary circumstances, and in any case the legislation would be expressed in terms which would leave no doubt about what was meant. *Prima facie* it is those who are authorized to do things, or to construct works, which are or may be dangerous or injurious to the public, who ought to provide and pay for whatever is necessary

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J.A.

for public protection or safety. If that is the just rule, then the order in question violates it. The township and the county, who represent the public, or a portion of the public, are made to contribute to the protection of the inhabitants from the danger of the company's trains. The highway, which was formerly safe for all Her Majesty's subjects, is now made dangerous by the company's line, and not by anything which the municipalities have done or are doing; and while the duty of the company, which is *origo mali*, to provide protection, is recognized by their being compelled to do so, and to pay a large part of the cost, yet the innocent municipalities are ordered to pay the remainder. The question, therefore, is, did Parliament by the language which it has used intend in a case like the present to impose the burden of contribution upon these municipalities? The question concerns the township and the county only, for the city of Toronto is not before us. The phrase used in all three sections is substantially the same, that is in 11 (i), 186, and 188. It is "municipality or person interested," and section 183 requires the apportionment to be just and reasonable. Of course if the Railway Committee had the power to make an apportionment against the township or county, its judgment or decision could not be reviewed by this Court on the ground of its not being just or reasonable; but the use of the words indicates that Parliament did not intend anything unjust or unreasonable to be done. In my opinion the sections relied upon do not authorize the order in question. The whole scope of the Railway Act is against it. The whole Act goes to shew that companies were to construct and maintain their lines and works at their own expense, and not at the expense of the public, and that private rights were not to be invaded or interfered with unnecessarily, and wherever necessary, only upon terms of compensation. Section 92 enacts that the company shall in the exercise of its powers do as little damage as possible, and shall make full compensation to all parties interested for all damage by them sustained by reason of the exercise of such powers. Sec-

tion 90 enumerates many of the powers conferred upon them with reference to property, both municipal and private; and by sub-sections (*g*) and (*h*) they are authorized to construct their lines across highways, to divert their courses either temporarily or permanently, and to raise or lower their levels so as to cross more conveniently. And section 91 requires them to restore any such highway as nearly as possible to its former state, or to put it in such a state as not materially to impair its usefulness. There are many other sections which evince the anxiety of Parliament that no unnecessary or unjust burden shall be cast upon any person or municipality, and that no right of property shall be invaded by the company in the exercise of any of its powers; and even section 187, which obliges them to provide gates and watchmen, or to execute other works of protection, expressly requires due compensation to be made for land taken for any such works.

Judgment.
 MACLENNAN,
 J. A.

In my opinion it is impossible to say that the appellants are municipalities interested within the meaning of section 188, so as to be compellable to pay part of the cost of gates and watchmen. So far as I can perceive they had no interest whatever in having watchmen or gates at the crossings. The only duty they had in relation to the road was a duty of repair, and this is not a question of repair; and they had no duty as regards either gates or watchmen. If an accident happened for want of either, they would not be liable. They had not made the crossing; nor could they prevent its being made, nor prevent trains from running over it. The soil and freehold is in the Crown. The only relation of either to the road, in fact, is that it lies within the territorial limits of both. The township has a duty of repair, and the county has not even that. If the county and township mean the inhabitants thereof, respectively, Consol. Municipal Act, 1892, sec. 3, [55 Vict. ch. 42 (O.)], then they have no more interest than any other municipality in the Province, for the highway is for the use of all Her Majesty's subjects.

There may, however, be municipalities so situated that

Judgment.
MACLENNAN,
J.A. they ought to contribute to the cost of maintaining a watchman and gates at a crossing. Suppose that, after a railway company has acquired and paid for its right of way and is running its trains, a municipality desires to open up a new street or highway across the line, and either by the consent of the company or by the authority of the Railway Committee under section 14 the new street or highway is made, it is clear that in such a case sections 11 (i), 186, 187, and 188, would be applicable, and it would be perfectly just and reasonable for the Railway Committee to require the municipality to contribute to the cost of such protection as might be necessary, whether it might be fencing, or gates, or watchmen. In Manitoba and the Territories new towns and even cities may spring up beside established lines of railway, and may require to construct many streets crossing the tracks, and a time might come when protection by gates and watchmen might be required at such crossings. In all such cases it would be the municipality which was, in the interest and for the benefit of its inhabitants, invading the vested rights of the railway company, and which could only do so upon just and reasonable terms, including perhaps the whole cost of necessary protection.

There being, therefore, a class of cases to which the language of the Act is clearly applicable without any injustice, I think it must be limited in construction to that class, and held not to be applicable to cases like the present to which it could not without clear injustice be extended: see the cases collected in Maxwell on Statutes, 3rd ed., pp. 277, 319.

I am, therefore, of opinion, with great respect, that the appeals should be allowed and that the judgment on the case should be for the appellants.

MEREDITH, J.:—

The object of the proceedings, in the Court below, was the enforcement of an order, made by the Railway Committee of the Queen's Privy Council for Canada; and the two main questions for consideration are:—

Was the matter one within the power of federal legislation? And, if so, was that power conferred upon that Committee?

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MEREDITH,
J.

Complete legislative power admittedly exists somewhere. Nothing turns upon the wisdom or unwisdom, or the reasonableness or unreasonableness of the thing, or whether it is preceded or unprecedented; those are matters for legislative, not judicial, consideration.

Then, exclusive power to make laws, in relation to such works and undertakings as the line of railway in question, is assigned to the Parliament of Canada: B. N. A. Act 1867, sec. 91, sub-sec. 29, and sec. 92, sub-sec. 10*a*. So that really the one debatable question, on this branch of the case, is, whether the enactment in question is legislation in relation to works and undertakings of lines of railway, or is legislation relating to property and civil rights only, and so within the power of provincial legislation exclusively: *ib.* sec. 92, sub-sec. 13.

I am yet unable to understand how it can, with any degree of success, be contended that legislation providing for the safety of the public at, and upon, a line of railway, is not very properly, and necessarily, a matter relating to such a work or undertaking: and, if that be so, why may not all who are "interested" be affected by such legislation? The legislation in question provides for such safety at such a place, and is expressly confined to the railway company and others interested in the matter. Nothing is gained by suggesting many things which Parliament could not do, or which it might do, but it would be obviously unjust to do: the one question is:—Had it power to pass an Act, which would warrant the making of the order in question, against those interested in the matter?

That Parliament has power to authorize the expropriation of lands for the purposes of a railway such as this, and to compel the land owners interested to contribute towards the erection and maintenance of railway fences upon their lands, was admitted on all hands, during the argument; and, that being so, I am yet unable to under-

Judgment.
MEREDITH,
J.

stand why the virtual owners of the public road in question, cannot equally be required to maintain fences and gates, or a gate only, across that road, for the double purpose of safe-guarding the public travelling across the railway upon the road, and the public travelling across the road upon the railway.

Under the Municipal Acts the public roads are vested in, and are under the jurisdiction, (subject to the rights of the Crown or any individual in the soil or freehold), of the municipalities in which they are situated, and they are to be kept in repair by such municipalities: and very wide powers over them, even the power, under certain restrictions, to close them, are conferred upon such municipalities by those Acts.

In this case, such municipalities are the city of Toronto and the township of York, each in respect of that part of the road within its boundaries: see secs. 525, 526, 527 and 531 of The Consolidated Municipal Act, 1892 [55 Vict. ch. 42 (O.)]. So that these two municipalities are directly interested in the matter in question: the gates are to be erected and maintained in their roads; and so erected and maintained, and the watchman stationed there, for, in part at all events, the protection of the public lawfully travelling upon such road, whose safety is, in a measure at all events, committed to the municipal corporation in the statute-imposed duty to keep the road in repair, and the statute-imposed liability for damages caused by the neglect of that duty.

Therefore, as to these two municipalities, the power to so legislate, in my opinion, existed.

Then, as to the second question: section 188 confers power upon the Railway Committee, to apportion the costs of the works, and of any of the measures of protection provided for in section 187, between the railway company and any person interested in the works, or protection, directed, or ordered: and the protection of streets and highways, by watchmen and gates, is expressly provided for in section 187, and the word "person" includes "any body corporate

and politic": R. S. C. ch. 1, sec. 7, sub-sec. 22: see *Casgrain* Judgment.
 v. *Atlantic and North-West R. W. Co.*, [1895] A. C. 282. MEREDITH,

J.

The legislation is expressly limited (as probably to be within the limits of railway legislation affecting property and civil rights, such as those in question, it must be) to those interested: and, as I have said, the city of Toronto, and the township of York, are, in my opinion, directly interested in the matter: but I am unable to perceive how the other municipal corporation is, in any way, interested in it. I have asked, more than once, what power of any sort, or what interest of any kind, this corporation has over, or in, this road, or in the traffic over it, or what reason why they, any more than the corporation of any other county in the Province, should be compellable to contribute, but have had no answer and I know of none. It is idle to say there is liability because the road is within the boundaries of the county, unless it can be shewn that that fact gives the corporation some power over it, or some duty in respect of it, or of the traffic over it. The farms through which the railway passes are in one county or another; can it be said that the corporation is so interested in them as to be concerned in the terms upon which the railway is operated over them?

No part of the road is in any sense a county road, nor is it one which the county can acquire without the consent of the township: see secs. 532 and 533 of the Consolidated Municipal Act, 1892. It would be quite within the power of the township council to erect and maintain gates, and provide a watchman, for the protection of traffic upon its roads: but it would be quite beyond the power of the county council to expend the county moneys, in that way, upon such township roads, and they might be enjoined from so doing at the instance of any other of the townships, which mainly provide the county funds; the road not being one within the provisions of 59 Vict. ch. 51, sec. 23 (O.).

If not "interested," the Committee had no power to make any order against the county: and its orders, though

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MEREDITH,
J.

final and conclusive, are final and conclusive only in matters over which it has power, not in matters in respect of which Parliament has conferred no jurisdiction upon it. And, where the assistance of the Court is sought to enforce its orders, there should, I think, be some degree of care to avoid enforcing an unwarranted order.

The order, in so far as it affects the corporation of the county of York, was, therefore, in my opinion, not warranted by the legislation in question, and is invalid because not within the power of the Railway Committee of the Queen's Privy Council for Canada.

I would, accordingly, reverse the judgment against the county, and affirm it in other respects, both with costs.

*Appeal of the County of York allowed,
and appeal of the Township of York dismissed.*

R. S. C.

IN RE GROSS.

Extradition—Offence Referred to by Wrong Name—Theft—Larceny.

Where there is evidence of the commission of an act which is recognized as a crime by the law of Canada and the law of the country demanding the extradition of the accused person, extradition will lie, though in the proceedings therefor the offence is referred to by a wrong name.

Larceny is, by the Ashburton Treaty, the Convention of 1889, and the Extradition Act, specified as a crime for which extradition to the United States will lie, but larceny is not, by that name, recognized as a crime by the Criminal Code, 1892, the terms there used to describe the same offence being "theft" or "stealing":—

Held, affirming the judgment of ROSE, J., that where there was evidence of the commission of the crime of theft the prisoner should be held for extradition, although in the proceedings for extradition the offence was described as larceny.

THIS was an appeal, in an extradition proceeding, Statement.
from the judgment of ROSE, J., and was argued before
BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on
the 10th of February, 1898.

J. F. Faulds, for the prisoner.

J. W. Curry, for the Crown.

February 18th, 1898. The judgment of the Court, in which the facts and arguments are stated, was delivered by

OSLER, J. A.:—

This was an appeal by William Gross, a prisoner confined in the common gaol of the county of York, from the judgment of Mr. Justice Rose, dismissing an application for his discharge when brought up on a writ of *habeas corpus*, and remanding him into custody. It appeared that the prisoner had been committed for extradition to the United States under four several warrants of the Judge of the County Court of the county of York, in respect of four charges of larceny alleged to have been committed by him in the State of Penn-

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OSLER,
J.A.

sylvania. These charges as expressed in the warrants are as follows: "the crime of larceny in that he did feloniously steal;" in the case of Reuben Ehret "one diamond ring of the value of \$115 of the goods and chattels of Reuben Ehret;" in the case of Faust & Sterner, "three diamond rings of the value of \$375 of the goods and chattels of Faust & Sterner;" in the case of E. Keiler & Son "two diamond rings of the value of \$275 of the goods and chattels of E. Keiler & Son;" and in the case of Charles Meinhofer "one diamond ring of the value of \$45 of the goods and chattels of Charles Meinhofer."

It is objected on behalf of the prisoner that he has not been accused of an extradition crime, or if so accused, that there is no sufficient evidence to justify his committal for extradition.

The existing extradition arrangement between Great Britain and the United States is found in the 10th article of the Ashburton Treaty (1842), and in the convention of the 12th of July, 1889, between Her Majesty and the United States, ratifications of which were exchanged at London on the 11th of March, 1890, by which the provisions of the 10th article of the treaty were made applicable to many additional crimes, *inter alia* to that of larceny. In 1877, the Parliament of Canada passed an Act, 40 Vict. ch. 25, to make provision for the extradition of fugitive criminals under then existing or any future treaties or arrangements which might from time to time be made between Her Majesty and foreign states. This Act is now found in the Revised Statutes of Canada, ch. 142 (1886), "The Extradition Act." By an order of Her Majesty the Queen in Council, dated 17th of November, 1888, it was directed that the operation of the Imperial Extradition Acts of 1870 and 1873, for giving effect to extradition arrangements, should be suspended within the Dominion so long as the Dominion Act of 1886 should continue in force and no longer. And finally by a further Imperial Order in Council of the 21st of March, 1890, for bringing into force by publication the convention of the 12th of July, 1889, it was ordered that the

Imperial Extradition Acts of 1870 and 1873 should "apply in the case of the United States and of the said convention with the United States," but it was again also ordered that their operation should be suspended within the Dominion of Canada so long as the provisions of the Canadian Act of 1886 continued in force: see Statutes of Canada, 1890, 53 Vict., Imperial Orders in Council, p. xliii.

Judgment.

OSLER,
J.A.

The treaty, the convention of 1889, and the Extradition Act, R. S. C. ch. 142, constitute the existing law governing the extradition of criminals from this country to the United States.

Section 2 (b) of the Extradition Act enacts that the expression "extradition crime" may mean any crime which if committed in Canada would be one of the crimes described in the first schedule to the Act, and in the application of the Act to the case of any extradition arrangement means any crime described in the arrangement whether comprised in the first schedule or not.

In the schedule, we find, under the heading "list of crimes," item 5 "larceny." The crime of larceny is therefore described—it may perhaps be more accurately said, specified—both in the extradition arrangement and in the schedule of extradition crimes to the Extradition Act.

Mr. Faulds, if I rightly understood his contention, urged that inasmuch as larceny is now by that name not a crime mentioned in our Criminal Code of 1892, 55-56 Vict. ch. 29 (D.), it is no longer an extradition crime. It would be strange indeed if a change in the name of the thing, which is not even the name employed in describing it in an indictment, should produce so alarming a result. Whatever was larceny here and in Pennsylvania, whether by common law or by statute at the time of the convention of 1889, was thereby made an extradition crime. Larceny at common law was plain theft—the wrongful taking and carrying away the property of another with the felonious intent to convert it to the taker's own use without the consent of the owner, and by our criminal law many other fraudulent dealings with the property of another were declared to be crimes, by that name. We have now abandoned that name

Judgment.

OSLER,
J.A.

as descriptive of these offences and embrace them all, including the common law offence of simple larceny, under the generic names of "theft" or "stealing": Code, sec. 305. If the evidence of criminality prescribed by the treaty sufficiently establishes the facts which constitute the offence described in the treaty, convention, and Extradition Act, that must be all that is necessary whether we call such offence larceny or stealing.

Section 305 of the Code defines theft or stealing as the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent *inter alia* to deprive the owner or any person having any special property or interest therein temporarily or absolutely of such thing or of such property or interest.

Then as to the evidence of the commission of the crime : [The learned Judge analyzed the evidence and continued :]

I am of opinion that the evidence *prima facie* establishes that the prisoner has been guilty of a crime which, to adapt the language of Burton, J. A., in *Re Hall* (1882), 8 A. R. 31, at p. 43, "by universal acceptance is recognized throughout the United States and Great Britain as" theft, stealing, or larceny, at common law. It is not necessary to consider in what position the case would have stood if the evidence had proved an offence which has with us only been made larceny or theft by statute. No evidence was given by the prosecutors that the law in Pennsylvania was the same as our law in that respect. The prisoner has offered no evidence on his own behalf. That offered by the prosecution if not met or explained in some way would quite warrant a jury in finding that the prisoner had obtained possession of the goods in question *animo furandi*—with the fraudulent intention at the moment he received them of depriving the owners of their property therein. As Coleridge, C. J., says in *Regina v. Ashwell* (1885), 16 Q. B. D., at p. 225: "According to all the cases, if at the very moment of the receipt of a chattel the receiver intends to misappropriate and does misappropriate it, he is guilty of larceny":

S. C., per Stephen, J., at p. 208, and Cave, J., at p. 200. And see Harris's Criminal Law, 7th ed., p. 200; Russell on Crimes, 5th ed., vol. 2, p. 134; *Rex v. Savage* (1831), 5 C. & P. 143.

Judgment.

OSLER,
J.A.

The circumstances under which the prisoner obtained these goods, his immediate abscondence to a foreign country, the evidence, weak though it be, of his having pawned some of them here under a false name, and his statements to the mayor of Allentown while in gaol, all strongly point to the conclusion that the rings were not innocently obtained by him in the first instance but with the fraudulent intention at the moment of depriving the owners of their property.

No objection was made to the formal sufficiency of the proof of the depositions, etc., on which the magistrate acted. There was some testimony taken *vivâ voce*, and as to the depositions taken in the United States they appear to be certified as the originals by a magistrate of the foreign state and authenticated by the oath of a witness as required by sec. 10, sub-sec. 2 (a) of the Extradition Act.

The appeal should, in my opinion, be dismissed and the order of Rose, J., remanding the prisoner for extradition, affirmed.

Appeal dismissed.

R. S. C.

BIRELY V. TORONTO, HAMILTON AND BUFFALO RAILWAY
COMPANY.

Railways—Expropriation—Award—Appeal—51 Vict. ch. 29, sec. 161 (D.).

Under section 161 of the Dominion Railway Act, 51 Vict. ch. 29 (D.), an appeal lies in this Province by either party from an award of compensation exceeding \$400 either to the Court of Appeal or to the High Court of Justice, but if an appeal is taken to the latter tribunal, no further appeal lies by either party to the Court of Appeal.

Statement. THIS was an appeal by the defendants from the judgment of ARMOUR, C. J., reported 28 O. R. 468, dismissing a motion by way of appeal from the award of arbitrators appointed under the Dominion Railway Act, 1888, and allowing the plaintiff's motion for judgment in the action for the amount of the award.

Upon the opening of the appeal the respondent moved to quash it, objecting that no appeal lay from the order dismissing the appeal from the award, the right of appeal in that respect having been exhausted, or from the judgment in the action in the plaintiff's favour, the defendants having agreed in that respect to be bound by the judgment in an action brought by another land-owner against them.

The motion was argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 14th of January, 1898.

Aylesworth, Q. C., for the plaintiff.

D'Arcy Tate, for the defendants.

March 10th, 1898. The judgment of the Court was delivered by

OSLER, J. A. :—

[The learned Judge dealt with the facts and held that, as far as the general right to compensation was concerned, the defendants were bound by the judgment in the test action, and then continued :]

The Act respecting Railway Arbitrations, 38 Vict. ch. 15 (O.), provided that any party to such arbitration might appeal from the award upon any question of law or fact to a judge of any of the superior courts of law or equity. In *In re Canada Southern R. W. Co. and Norvall* (1877), 41 U. C. R. 195, such an appeal was brought before Harrison, C. J., and dismissed by him. It was afterwards held by this Court that no appeal lay from his decision. The judgment of this Court is not reported, but is referred to in *Norvall v. Canada Southern R. W. Co.* (1880), 5 A. R., at p. 13, and *Norvall v. Canada Southern R. W. Co.* (1884), 9 A. R., at p. 312. The provisions of the Act were consolidated in R. S. O. (1877) ch. 165, sec. 20 (19), (20), and on the 3rd of March, 1886, a similar appeal from the decision of Boyd, C., in *Darling v. Midland R. W. Co.* (1885), 11 P. R. 32, was quashed on the ground that this Court had no jurisdiction to entertain it, the appeal to the judge being an entirely independent jurisdiction given to him by statute in which he was acting as *persona designata*.

The Dominion Railway Act, 1888, 51 Vict. ch. 29, sec. 161, enacts that whenever the award of compensation exceeds \$400, any party to the arbitration may appeal therefrom upon any question of law or fact to a superior court of the Province in which the lands are situate. If the question is one of fact the court is to decide the same upon the evidence as in a case of original jurisdiction. The practice and proceedings upon such appeal are to be the same as nearly as may be as upon an appeal from the decision of an inferior court to said court, subject to any general rules or orders from time to time made by the judges of said superior court with respect to such appeals. And lastly, the right of appeal thereby given is not to affect the existing law or practice in any Province as to setting aside awards. By the interpretation clause of the Act, sec. 2 (c), the expression "Court" means a superior court of the Province, and by the General Interpretation Act, R. S. C. ch. 1, sec. 7 (31), the expression "Superior Court" means in the Province of Ontario the Court of Appeal for Ontario and the High Court of Justice for Ontario.

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

While, therefore, not interfering in any way with the existing law and practice as to setting aside awards, the Act creates a special appellate tribunal for reviewing the decision of the arbitrators on the law and the facts. This tribunal being a superior court of the Province is by force of the Interpretation Act either the Court of Appeal or the High Court of Justice, to either of which the party dissatisfied with the award may resort. In this respect concurrent jurisdiction is conferred upon these courts, and if from the decision of either a further appeal lies, we must find it given by the same legislature which gave the first appeal. It may be that by force of section 24 (f) of the Supreme Court Act, R. S. C. ch. 135, there is an appeal to that Court, but no second appeal to any provincial court is given by the Act, and, therefore, so far as provincial courts are concerned the decision of the court selected by the appellant is final.

Appeal quashed.

R. S. C.

YELLAND V. YELLAND.

Benevolent Society—Certificate—Change in Rules.

A certificate issued by a benevolent society providing for payment of the endowment to the member's "next of kin," and expressed to be subject to the constitution and by-laws of the society then in force and also to such amendments and alterations as might thereafter be regularly adopted, is not affected by a subsequent change of the rules of the society omitting "next of kin" by that name from the classes of persons to whom certificates may be made payable.

Judgment of MACMAHON, J., affirmed.

THIS was an appeal by the defendants from the judgment of MACMAHON, J. Statement.

The following statement of the facts is taken from the judgment of OSLER, J. A.:—One Dr. A. E. Yelland, who was the son of the plaintiff and the father of the principal defendant Wm. Albert Yelland, in January, 1889, made an application to be admitted to membership in the Canadian Order of Foresters, a benevolent society incorporated under the existing Act relating to these bodies, and for an endowment certificate or policy of insurance therein for the sum of \$1,000. By his application he directed that the endowment should "be designated as payable to" himself. He was admitted to membership, and received an endowment certificate bearing date the 1st of April, 1889, under the seal of the society.

In the certificate it is declared and set forth as follows:

"This certificate is subject to the constitution and to such by-laws as are now in force and to such amendments or additions as may hereafter be adopted by the order or court of which the insured is a member.

"This certificate is designated as payable to 'my next of kin,' and must be presented at the time of application for payment. Should any change in the name of payee or payees be desired notice of such change must be given to the high secretary and endorsed by him on the back of this certificate."

Statement. Dr. Yelland received the certificate, and had it in his possession up to the time of his death.

Mr. White, the high secretary of the society, explained that the society considered that the applicant could not under the rules of the society properly designate himself as the beneficiary, and therefore the next of kin were designated therein as such beneficiaries whenever an application came before them in the form presented by deceased. This, he said, they were advised by their solicitor to do in such cases as being the proper method under the rules of the society then in force, understanding that "next of kin" in the case of a married man meant his family—his immediate family—by descent. The rules of the society provided "that upon the death of a brother in good standing his wife, next of kin, or designated payees shall receive the sum of \$1,000, such amount to be payable out of the endowment fund of the high court."

At this date the insured was married, but his wife afterwards died without issue. He subsequently married the defendant Eliza Yelland, by whom he had issue, the respondent William Albert Yelland. He died on the 26th of February, 1896, a member of the society in good standing.

During the year 1895 the rules of the society were altered and amended in several respects, and by rule one of the "insurance law" it was provided that "upon satisfactory proof of the death of a beneficiary member in good standing, the wife, children, or other designated payee or payees of the deceased shall receive the amount of insurance as named in his insurance certificate, such amount to be paid out of the insurance fund of the high court."

Rule 12, corresponding with a similar rule of the rules of 1888, provided that "In case where no person or persons are entitled to the insurance it will revert to the insurance fund of the high court."

By his will Dr. Yelland, after making certain specific bequests, bequeathed the residue of his estate to the

defendant William G. Yelland, his brother, and to his wife, the defendant Eliza Yelland, appointing them the executors upon trust to apply the income of such residue for the support of his wife and infant son as therein provided. The society were advised that the executors were entitled to the amount of the beneficiary certificate, and accordingly paid it over to them "in trust for infant William Albert Yelland." This payment, if wrong in whole or in part, is defended under section 12 of the Benevolent and Provident Societies Act as a payment made in good faith to the wrong persons, and the plaintiff under the same section now brings this action to recover the share or proportion to which, as one of the next of kin of the deceased, he claims to be entitled by the terms of the certificate. Statement.

The action was tried at Peterborough on the 11th of May, 1897, before MACMAHON, J., who on the 19th of May, 1897, gave judgment in the plaintiff's favour.

The defendants' appeal from that judgment was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 27th of January, 1898.

Watson, Q.C., and *W. H. Moore*, for the appellant. The certificate should be read as if payable to the assured's representatives, and the amount in question should be held to be part of his estate. The assured was bound by the rules, and by the changes from time to time made, and the certificate is also subject to the changed regulations: *Wells v. Independent Order of Foresters* (1889), 17 O. R. 317; *Baker v. Forest City Lodge* (1897), 24 A. R. 585; 3 Am. & Eng. Encyc. of Law, 2nd ed., pp. 1066, 1067.

Poussette, Q.C., for the respondent. This was equivalent to a settlement, and the subsequent changes in the rules cannot affect the vested rights given by it: *In re Roddick* (1896), 27 O. R. 537; *Simmons v. Simmons* (1893), 24 O. R. 662; *Neilson v. Trusts Corporation of Ontario*

Argument. (1894), 24 O. R. 517; *Dolen v. Metropolitan Life Ins. Co.*
(1894), 26 O. R. 67.

Watson, Q.C., in reply.

March 15th, 1898. The judgment of the Court was delivered by

OSLER, J. A. :—

It has been held by my learned brother that the plaintiff and the infant defendant are, the one in the ascending, the other in the descending line the only next of kin of the deceased within the meaning of the term as used in the certificate: *Withy v. Mangles* (1841), 5 Beav. 358; *S. C.* (1843), 10 Cl. & F. 215, and that is not now contested. He also held that the contract between the deceased and the society was evidenced by the terms of the certificate, and therefore that the money payable thereunder belonged to these two parties as next of kin in equal shares, and that the plaintiff was entitled to recover from the executors one-half of the sum they had received from the society.

The defendants contend (1) That the certificate should be read and construed as if the deceased had been designated therein as the beneficiary in accordance with the terms of his application, the insertion by the society of the next of kin as such having been unauthorized by him and not adopted or ratified by him, and the contract issued by the society not being the contract he applied for or accepted. If the contract were read as thus contended for, the money payable under it would pass to the defendants, the executors, under the will as part of the residue, and be held by them as such subject to the trusts of the will. (2) In the alternative, it is contended that inasmuch as the certificate is expressed to be subject not merely to the constitution and by-laws of the society then in force, but also to such amendments and alterations as might thereafter be legally adopted, the effect of the rule or

by-law 1 of 1895 above mentioned is that "next of kin" are no longer, by that designation, capable of being beneficiaries under the rules of the society, and therefore that such designation must, from the time that rule was passed, be read out of the certificate, and that the money would then be payable to the wife and child of the deceased in equal shares.

Judgment.

OSLER,
J.A.

I think neither of these contentions is entitled to prevail.

As to the first: The action is not one for the reformation of the certificate. If there was any contract between the deceased and the society it is now represented by the certificate alone. Whether the deceased accepted it or not was a question of fact to be determined by the trial Judge, and the fact that he received it from the society and retained it until his death, nearly six years afterwards, was quite enough to warrant any tribunal in finding that he was satisfied with it in the form in which it issued designating his next of kin instead of himself as the beneficiary. It must now be construed in accordance with its terms, so far as these terms are not controlled by any rules of the society which may be imported into it. If the rules of 1895 do not qualify or alter it, the decision of the learned trial Judge is right.

2. I am of opinion that these rules do not affect the certificate. I concede that the deceased was bound by such rules, and if that were necessary that he had notice of them. I should, however, hesitate long before coming to the conclusion that by force of such rules a formal contract between the society and the deceased could be affected so as to change the person or class which had already been nominated as beneficiaries under rules then existing.

Such a case differs materially from cases like *Baker v. Forest City Lodge* (1897), 24 A. R. 585, where the rights in question depended upon and were conferred by the rules alone. Here, by the express terms of the original rule, next of kin are named as beneficiaries, to whom, by force of the rule, the endowment may be paid. They are omitted from

Judgment.

OSLER,
J. A.

the rule of 1895, but there is nothing in that rule to forbid the member from expressly designating them as beneficiaries, as that rule permits the money to be paid to the wife, children, or other designated payee or payees. There can be no reason why they may not be designated beneficiaries as a class just as children may be; and if so, how can we say that the rule of 1895 has in any way affected the certificate when we find that persons as a class not thereby forbidden to be beneficiaries are named therein as such? The deceased, if he examined his certificate after the rule was passed, may well have been satisfied that it still represented his wishes, as, we must take it, it formerly did.

The appeal, in my opinion, fails on all grounds, and must be dismissed.

Appeal dismissed.

R. S. C.

WEBSTER V. CRICKMORE.

*Bankruptcy and Insolvency—Assignments and Preferences—Pressure—
Agreement to Give Security.*

Where a preferential security, given while R.S.O. (1887) ch. 124, as amended by 54 Vict. ch. 20, was in force, is attacked within sixty days, evidence of pressure is not admissible to rebut the presumption of intent to give a preference.

An agreement to give security, made in good faith, may, even though it is indefinite in its terms, avail to rebut the presumption of intent to prefer, but where the giving of security is deliberately postponed in order to avoid injury to the debtor's credit, or to avoid the statutory presumption, the agreement to give the security is of no avail.

Judgment of ARMOUR, C. J., reversed, BURTON, C. J. O., dissenting.

THIS was an appeal by the plaintiff from the judgment Statement.
at the trial.

The plaintiff was an execution creditor of the defendants the Crickmores, and brought the action on the 15th of December, 1896, to set aside as preferential and void, a chattel mortgage for \$2,000, made on the 17th of October, 1896, by the Crickmores, who were then in insolvent circumstances, in favour of the defendants Strickland and Poussette, as collateral security for a then existing indebtedness. The defendants Strickland and Poussette pleaded that the chattel mortgage was given in pursuance of an agreement made in February, 1896, when a readjustment of then existing securities was arranged, and also that they had taken the chattel mortgage in good faith without knowledge, or notice, of the insolvent condition of the Crickmores.

The action was tried at Toronto, on the 9th of September, 1897, before ARMOUR, C.J., who dismissed it with costs.

The plaintiff's appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 3rd and 4th of February, 1898.

E. B. Ryckman, and *C. W. Kerr*, for the appellant. The mortgagors were insolvent to the knowledge of the mort-

Argument. gagees when the mortgage was given, and it has been attacked within sixty days; therefore it is void: *Lawson v. McGeoch* (1893), 20 A. R. 464; *Beattie v. Wenger* (1897), 24 A. R. 72. The prior agreement to give the mortgage has not been made out; the inference from the evidence is that the taking of the mortgage was postponed in order to avoid injury to the mortgagors' credit and to evade the Act: *Breese v. Knox* (1897), 24 A. R. 203. Pressure is of no avail where the transaction is attacked within sixty days: *Lawson v. McGeoch* (1893), 20 A. R. 464; *Beattie v. Wenger* (1897), 24 A. R. 72.

J. B. Clarke, Q. C., for the respondents. The mortgage was made under pressure and pursuant to a prior agreement entered into in good faith, and should be upheld: *Molsons Bank v. Halter* (1890), 18 S. C. R. 88; *Montgomery v. Corbit* (1896), 24 A. R. 311.

E. B. Ryckman, in reply.

March 15th, 1898. OSLER, J. A. :—

Omitting certain *obiter dicta* concerning former decisions, the findings of the learned Chief Justice are as follows :—

“I think the transaction was perfectly honest and straightforward with regard to taking the mortgage. I think Mr. Poussette (one of the defendants) knew that these parties (the mortgagors) were in difficulties, that Crickmore himself was insolvent, and I think he had reasonable grounds for believing that Mrs. Crickmore was also insolvent, and I think they were in fact insolvent according to my view, but I think it was an honest debt, and that pressure was exerted and that he had a right to take the chattel mortgage, and that the chattel mortgage is good.”

As to an agreement to give the chattel mortgage, the learned Chief Justice said :—“I cannot understand that there was any prior agreement to give the chattel mortgage. I think there was a prior agreement to give security, but there were no particular chattels specified, or

anything of that kind. It was an agreement to give security—that only shews that the transaction was not fraudulent. I think it was a perfectly honest transaction, and unless it is rendered invalid by reason of the statute, it is perfectly good.” The action was accordingly dismissed, apparently on the ground that the transaction was an honest one, and that pressure had been exerted upon the mortgagors to carry it out.

The evidence as to the agreement is very vague. Such as it was, it was a verbal agreement in February, 1894, in such terms as these: “Well, of course, we can give you a mortgage on those too (the chattels) if you require it. We will give you security on anything that we have.” It was not more specific than that, and no attempt was made to have it carried out until the following October, when the mortgagors were insolvent. Mr. Poussette said that one of the reasons why he had not asked for it sooner was that Crickmore did not wish to have it registered against his property, and he was willing to accommodate him as much as he could.

It appears to me, that a chattel mortgage taken under these circumstances, however honest the debt for which it is taken, cannot be supported by such an agreement consistently with the decision of the Supreme Court in *Clarkson v. McMaster* (1895), 25 S. C. R. 96, and of this Court in *Clarkson v. Ellis* (unreported). I do not rest my judgment on the ground that the agreement was a verbal one, and so perhaps avoided by the statute, 59 Vict. ch. 34, sec. 4 (O.), passed soon after it was made—for I think an honest verbal agreement, even as indefinite as the above, may be available to rebut the intent to prefer, when the instrument is not attacked, or the assignment is not made, for more than sixty days after it is given—but on the ground that the taking of the mortgage was deliberately postponed until the debtors were in a state of insolvency, and that it was not, from the very first, intended to be taken until the circumstances of the debtors should render it necessary to do so.

Judgment.

OSLER,
J.A.

If the agreement is eliminated, the case comes within the words of the Act, for the action to set aside the mortgage was brought within sixty days after it was given. It is then presumed, as the Act stood at the time it was given, to have been made with the prohibited intent, and that presumption is, I think, for reasons I have given elsewhere, not a rebuttable one.

It has always appeared to me that the object of the Legislature in the case of instruments made within the arbitrary period of sixty days before they were attacked, or before the debtor made an assignment, was to shut out all enquiry as to the intent with which they were given, and to avoid them for the benefit of the general body of the creditors. That principle is by no means novel. It is found in the 133rd section of the Insolvent Act of 1875, as it at first stood. If the instrument was executed earlier than sixty days before it was attacked, or before the assignment, it might be supported by proof of anything which would rebut the intent to prefer, but if the debtor's affairs were then in so precarious a state as to make insolvency inevitable sixty days afterwards, it was intended that the creditor should not have the advantage he had attempted to secure, at the expense of the other creditors. Of course if it had been given in pursuance of a prior valid agreement it might be supported on a different ground. It would not then be within the statute at all.

Here, the agreement, for the reasons I have mentioned, is one which it is not open to the creditor to invoke, and then his security is destroyed by the Act, the improper intent being inferred, and not being open to be rebutted by evidence of pressure, or of other facts which might have been introduced for that purpose had the attack upon it been delayed a little longer.

As regards the much debated subject of pressure, I must add that whenever it is available to support an instrument attacked as being an unjust preference, I consider the law thereon in this Province to be as it is stated in such cases as *McCrae v. White* (1883), 9 S. C. R. 22; *Long v. Hancock*

(1885), 12 S. C. R. 532; *Molsons Bank v. Halter* (1890), 18 S. C. R. 88; and *Slater v. Oliver* (1884), 7 O. R. 158.

Judgment

OSLER,
J.A.

MACLENNAN, J. A. :—

I also am of opinion that the appeal should be allowed.

Moss, J.A. :—

The chattel mortgage in question herein was made on the 17th of October, 1896. This action was commenced on the 15th of December, 1896, so that the transaction has been impeached within sixty days.

The learned Chief Justice who tried the case held (1) that there was a valid debt, (2) that the defendants the Crickmores were in fact insolvent within the meaning of R.S.O. (1887) ch. 124, and the amendment thereto, (3) that the defendant Poussette was aware that the Crickmores were in difficulties, and he knew that E. Crickmore was insolvent, and had reasonable grounds for believing that Mrs. Crickmore was also insolvent, (4) that there was no prior agreement to give the chattel mortgage, (5) that the transaction was perfectly honest and straightforward, and (6) that pressure was exercised, and he dismissed the action.

The transaction is impeached as coming within sec. 2, sub-secs. 2 and 2 (a) of R. S. O. (1887) ch. 124, as amended by 54 Vict. ch. 20 (O.).

The defendants seek to avoid the presumption of intent to give a preference upon the grounds of a prior agreement to give the chattel mortgage made in February, 1896, and of pressure exercised at the time when the mortgage was actually given.

The learned Chief Justice found, and I agree, that there was in fact no prior agreement. But if there had been I think the principle of *Clarkson v. McMaster* (1895), 25 S. C. R. 96, should be applied to the case. An agreement that the giving of the chattel mortgage is to be postponed—

Judgment.

Moss,
J.A.

because to file it would injure the debtor's business—until his desperate circumstances make it wholly imprudent as well as unnecessary to longer refrain from taking it, is I venture to think as much opposed to the policy of the law as the actual taking of a chattel mortgage under an agreement that it is not to be filed as required by the statute. In each case there is concealment from the other creditors of the mortgagor and the dealing should be treated as void *ab initio*.

With respect to the defence of pressure, in the view I take of the case, and having regard to the change wrought in the language of sub-secs. (1) and (2) of sec. 2 of 54 Vict. ch. 20 (O.), in the process of recent revision of the statutes of Ontario, I do not feel called upon to express any opinion as to the extent of the conclusive or non-conclusive effect of the presumption created by these enactments in their unaltered form. But the argument pressed upon us that the pressure found to have been exercised in this case must, notwithstanding the date of the transaction, be considered in dealing with the question of intent, and that taken in connection with the finding of honesty and good faith, it is sufficient to uphold the transaction, renders it necessary to consider the question whether pressure can be at all invoked to support a transaction occurring within sixty days of an action to impeach it, or of the date of an assignment for the benefit of creditors.

With great respect for those who entertain a different opinion, I am of opinion that in any case coming within the prescribed conditions of sub-sections 2 (a) and 2 (b) of section 2—assuming the presumption to be rebuttable—the doctrine of pressure is excluded as an element in displacing intent to give an unjust preference. I am unable otherwise to account for the presence in these sub-sections of the words “whether the same be made voluntarily or under pressure.”

There is no doubt that before the Legislature enacted these provisions there was much dissatisfaction with the

existing state of the law relating to pressure, and it seems plain that the intention was to deal with the question of preferences to creditors.

Judgment.

Moss,
J.A.

Sub-sections 2 (a) and 2 (b) are directed against preferences to favoured creditors as opposed to transactions entered into with intent to defeat, hinder, delay or prejudice creditors generally, and were certainly intended to effect some alteration in the existing law with respect to preferences.

Under the then existing law a gift, conveyance, or transfer, made to a creditor by a debtor in insolvent circumstances, or unable to pay his debts in full, of his own mere motion, and as a favour proceeding voluntarily from himself, was presumed to have been made with intent to prefer or to give an unjust preference. But no such presumption arose with regard to a conveyance, or transfer, made under pressure from the creditor, and not originating with the debtor.

The object of the Legislature in enacting the amendments contained in sub-sections 2 (a) and 2 (b) was to abolish the application of the doctrine of pressure in support of any transaction having the effect of a preference made within sixty days before an action to impeach it, or an assignment under the Act, but to leave the law untouched as regarded transactions not coming within the sixty days' limit.

It is in substance declared that as regards any transaction with or for a creditor, which has the effect of giving that creditor a preference over other creditors, it shall, if within the sixty days' limit, be presumed to have been made with intent to give an unjust preference, and to be an unjust preference although it may have been made under pressure.

There is, in effect, a declaration that the same presumption shall be made in the case of a transaction made under pressure as in the case of a transaction shewn to be the outcome of the voluntary or spontaneous act of the debtor.

The presumption is to be made notwithstanding that the

Judgment.

Moss,
J.A.

impeached conveyance, or transfer, was made under pressure. A transfer to a creditor made voluntarily, and a transfer to a creditor made under pressure, are put upon the same footing as regards presumption of intent. The element of pressure is eliminated from the latter transaction as it always was from the voluntary transfer by the very nature of the case. The statute declares pressure to be as nothing against the presumption in the prescribed circumstances.

Then coupling it with something else cannot give it vitality to assist in displacing the presumption which the statute declares shall exist notwithstanding the fact of pressure. The sum total cannot be increased by adding nothing to something.

I think the effect of the legislation is that in seeking to displace the intent and to negative unjust preference in a transaction coming within the conditions of these sub-sections pressure is to be left out as a factor.

The result as regards this case is that there is nothing to rebut the presumption of intent to give a preference, and having regard to the other circumstances the transaction comes within sub-section 2 (a) of section 2.

BURTON, C. J. O.:—

This appeal involves the re-consideration of the construction to be placed upon section 2 of the Assignments and Preferences Act, with the additional light thrown upon it by the enactment of last session, which adopts and confirms the opinions of those Judges who had interpreted the presumption of intent referred to in that section as a rebuttable presumption. I was one of those who adopted that view of the enactment, but I am free to confess that if I had been legislating on the subject, instead of interpreting the language of the Legislature, I should have inclined to the view that when a transaction occurs so shortly before the insolvency, it might, in order to avoid nice enquiries about the intent of the parties, have been better to have declared that it should be absolutely void.

There was a time when the doctrine of pressure had been carried to such a length that the mere fact of a demand having been made on the debtor and the finding that that had something to do with bringing about the transfer sought to be impeached were sufficient for the Court to hold it not to be a fraudulent preference. This amounted in some cases almost to a scandal, and it is not surprising that a very general opinion prevailed that the legislation in question was intended to do away in certain cases with that doctrine altogether, and it has been held by some Judges that so far as pressure is concerned the presumption referred to in the statute was intended to be irrebuttable. That never has been my view, and when we consider the tendency of some of the more recent decisions as I read them, I cannot say that I consider such a change desirable.

I think the proper construction to place upon the section is that if the transaction is impeached within sixty days it shall be presumed to be made with the prohibited intent, so as to render it unnecessary for the party attacking it to go further than to shew that it occurred within the sixty days ; the onus of rebutting the presumption of an intent to prefer is then shifted so that the person supporting the impeached transaction undertakes the very onerous task of shewing it to be valid.

But I do not understand that the presumption as to pressure any more than any other matter which would go to rebut the intent is irrebuttable. All that is meant by introducing the words "or under pressure" is, I think, to provide for all cases occurring within the sixty days ; but in all cases it is still open to the party supporting the impeached transaction to prove that facts and circumstances exist which will rebut the presumption, as for instance, that a valid written agreement was made and registered before the sixty days, or any other matter, including clear and conclusive evidence that it was by reason of the pressure that the transfer was made, otherwise we should have the extraordinary state of things that sixty-one days

Judgment.

BURTON,
C.J.O.

Judgment.

BURTON,
C.J.O.

before the action a transfer brought about by pressure might be good, but not if made a day later, although the statute provides that it shall be a presumption merely. I think there is nothing in the language of the Act to shew that the presumption of intent is rebuttable in the one case and not in all. A fuller investigation of the matter in the light of the recent legislation induces me to qualify what I appear to have said in *Lawson v. McGeoch* (1893), 20 A. R. 464, and I think I must hold that the only effect of the amendment is to shift the onus.

In the present case, the learned Judge found at the trial that the impeached transaction was perfectly honest, and no one can read the evidence without being impressed with that view; and he holds, as is also clear, that there was an actual debt, and that the transaction was valid both at common law and under the statute of Elizabeth. But he finds also that Crickmore was insolvent to the knowledge of Poussette, and that Poussette had also reasonable grounds for believing that Mrs. Crickmore was insolvent at the time the mortgage was given; and he finds that they were both insolvent according to his view of the law. But the debt being honest and the mortgage having been given, not with the real and substantial intent to give a preference, but by reason of the pressure and the moral obligation to carry out the promise, he holds it good.

The question, therefore, seems to arise squarely, whether, the onus being upon the mortgagees to support the transaction, there is evidence here to warrant the conclusion at which the learned Judge has arrived. If this had been a case not within the sixty days, I think that his finding, treating the question as I think it should be dealt with, as to what was the dominant motive in giving the mortgage, would not be interfered with in an appellate court; and no difficulty arises here, as is too frequently the case in transactions of this kind, as to the credibility of the parties. I place the most implicit reliance on the statements of the parties, and can only regret the reckless manner in which this unfortunate lady's means have been

frittered away. But there are many circumstances beyond the mere fact that the debt was honestly due to be looked at. A very large part of the debt was at one time amply secured, and that security was given up to enable Crickmore to obtain a loan, and from that loan an amount of \$4,800 of the debt to Poussette was actually paid, but on the earnest entreaties of Mr. and Mrs. Crickmore \$1,000 was advanced from it to Mrs. Crickmore. Crickmore then said he was willing to give a chattel mortgage if Poussette required it, and, although it was not then taken, it tends to confirm the evidence that when it was given it was in consequence of Poussette insisting upon it.

I find it very difficult to say that the learned Judge was wrong in holding that the intent to prefer was disproved, and I am of opinion, therefore, that we ought not to interfere with his finding.

Judgment.

BURTON,
C.J.O.

Appeal allowed, BURTON, C. J. O., dissenting.

R. S. C.

FISHER V. FISHER.

Benevolent Society—Life Insurance—Construction of Certificate—Designation of Beneficiary—Insurance for Benefit of Wife—R.S.O. (1887) ch. 136.

An application for a benevolent society's certificate stated that the insurance money was to be paid to the applicant's wife, and the certificate as issued and accepted provided that the money should, upon the death of the member, be paid to his wife, or such other beneficiary or beneficiaries as he might in his lifetime have designated in writing indorsed on the certificate, and in default of any such designation to his legal personal representatives :—

Held, OSLER, J. A., dissenting, that the certificate came within the Act to secure to wives and children the benefit of life assurance, R.S.O. (1887) ch. 136, and that the wife's interest was not affected by an absolute assignment, endorsed upon it, by the assured to a creditor. Judgment of STREET, J., 28 O.R. 459, reversed.

Statement. THIS was an appeal by the plaintiff from the judgment of STREET, J., reported 28 O. R. 459.

The plaintiff was the widow of James T. Fisher, and the defendant was his brother. The action was brought to recover \$835 received by the defendant upon a policy or certificate of insurance upon the life of James T. Fisher, issued on the 19th of May, 1888, by the Commercial Travellers' Mutual Benefit Society.

By the policy or certificate the society promised to pay the amount of the insurance upon the death of the assured "to Mrs. Agnes E. E. Fisher, his wife, or such other beneficiary or beneficiaries as the said James Thorburn Fisher may in his lifetime have designated in writing endorsed on this certificate, and in default of any such designation to his legal representatives."

The application for the insurance was made on the 7th of May, 1888, and in that application the applicant, in answer to the printed direction, "Give full name and relationship of the person or persons to whom you desire your death loss paid," wrote "wife, Agnes E. E. Fisher."

On the 12th of April, 1892, the assured endorsed upon the policy an absolute assignment to the defendant, and notice of the assignment was given by the defendant to

the society, and all premiums were afterwards paid by him. This assignment, though absolute in form, was intended only as security for the payment of two notes for \$75 each, made by the assured in favour of the defendant, and subsequently the defendant, from time to time, made additional advances to the assured, there being, however, no agreement that these advances were to be repaid out of the insurance money. On the 14th of November, 1895, the assured died, and on the 18th of January, 1896, the defendant received \$835 as the amount due upon the policy. Statement.

After the death of the assured correspondence took place between the plaintiff and the defendant as to the disposition to be made of the money received by the defendant, the effect of this correspondence being set out in the report below.

The action was tried at Toronto on the 20th of April, and 22nd of May, 1897, before STREET, J., who on the 29th of May, 1897, gave judgment in the defendant's favour.

The plaintiff appealed and the appeal was argued before BURTON, C.J.O., OSLER, and MACLENNAN, JJ.A., on the 31st of January, 1898.

McCarthy, Q.C., and *W. J. McWhinney*, for the appellant. The plaintiff is named in the application as the beneficiary and the certificate based upon and issued in pursuance of that application also names the plaintiff as beneficiary, so that the certificate is subject to the provisions of the Act to secure to wives and children the benefit of life insurance, R. S. O. (1887) ch. 136, and a trust has been created in favour of the plaintiff which the assured could not revoke. The provision in the certificate in reference to a change of beneficiaries must be limited by the provisions of that Act, and the only change that could be made by the assured would be one in accordance with the provisions of that Act, and the assignment to the defen-

Argument. dant was wholly inoperative: see *In re Eaton* (1893), 23 O. R. 593; *Scott v. Scott* (1890), 20 O. R. 313; *Carey v. Carey* (1854), 6 Ir. Ch. Rep. 255; *In re Delmar Charitable Trust*, [1897] 2 Ch. 163. The plaintiff is not estopped by what took place after the death of the assured before she was aware of her legal position.

Aylesworth, Q.C., for the respondent. The certificate in question was not subject to the provisions of the Act to secure to wives and children the benefit of life insurance, there being on the face of the certificate the right reserved to the assured to change the beneficiaries if he saw fit, and the assignment by the assured, pursuant to this power, to the defendant, must be upheld. The application cannot control the provisions of the certificate actually issued. Even if, strictly speaking, the plaintiff was entitled to the insurance money she, with full knowledge of the facts, agreed that the defendant should keep the money on account of his claim against the assured, and she is estopped from now claiming the fund.

McCarthy, Q.C., in reply.

March 15th, 1898. BURTON, C.J.O.:—

So far back as 1865 the Legislature very wisely and humanely passed an Act to secure to wives and children the benefit of life assurance, but, having regard to the interests of creditors, endowment policies were not included within its provisions, it being thought, not probably without some reason, that the Act might be used by dishonest persons as a means of protecting against creditors for a number of years a fund which might at the maturity of the policy be appropriated by them to their own use instead of the support of the wife and children, when, as originally intended, the moneys were payable at his death as a provision for them.

With the wisdom or unwisdom of the change we are not concerned, and I only refer to it for the purpose of shewing that when once a policy was issued in favour of

wife or children it became an irrevocable trust, placing it not only beyond the reach of creditors but beyond the control of the husband.

Judgment.

BURTON,
C.J.O.

In the amendments passed from time to time power has been given to vary the apportionment of the insurance fund from time to time, but only in keeping with the provisions of the Act among those who by recent legislation are styled "preferred beneficiaries," but not so as to alienate it from them or dispose of it to a stranger.

The only question upon which I have felt any serious doubt in this case was as to whether the policy came within the Act for securing to wives and children the benefit of life assurance or whether it was an ordinary voluntary settlement of the policy irrespective of that Act, no reference being made in any of the documents to it.

I find that a similar question was raised in England in a case of *Holt v. Everall* (1876), 2 Ch. D. 266, and decided in the Court of Appeal shortly after the passing of the Married Woman's Property Act of 1870, which contained a clause similar to that found in our Act.

The question there arose under the 91st section of the Bankruptcy Act of 1869, which made void, as against the trustee, all settlements by a trader who became bankrupt within two years after the date of the settlement.

There was nothing upon the face of the policy or in the application to shew that it was taken out relying upon the provisions of the Married Woman's Property Act or making any reference to it. Hall, V.-C., held that the trustee in bankruptcy was entitled to treat the settlement as void, but his judgment was reversed by the Court of Appeal.

Lord Justice James used this language: "The policies were granted in 1871 and expressed to be effected by a married man on his own life, and on the face of them to be for the benefit of his wife. Now the Act says that such policies shall be for the benefit of his wife, and shall not be subject to the control of the husband or of his creditors, or form part of his estate. * * The policies are then *primâ facie* within that section."

Judgment.

BURTON,
C.J.O.

The clause of the Act [R. S. O. (1887) ch. 136, sec. 5] bearing upon the case before us is this (omitting some immaterial portions):

“In case a policy of insurance effected by a man on his life is expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them * * such policy shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them according to the intent so expressed or declared, and so long as any object of the trust remains the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable.”

It was at one time considered very doubtful whether this Act applied to assurance granted by friendly or benevolent societies, but this was set at rest by the Act 51 Vict. ch. 22 (O.), which was for a short time in force, and afterwards by the Act of 1892, and a contract of insurance by a friendly society may now be issued in favour of a wife or children subject to all the provisions of the Act to secure to them the benefits of life assurance.

If a policy in favour of the wife had been granted by a life assurance company in this form it could not admit of doubt that a trust would have been created in her favour subject only to the right of the assured to alter the apportionment in the manner provided in the Act. That is, as I have said, among the children or other persons now known in the Acts as “preferred beneficiaries” but only in the case of her death in the lifetime of the assured would he be entitled to make a fresh declaration of apportionment to a stranger.

This then being the state of the law the husband of the plaintiff applied to the Commercial Travellers’ Mutual Benefit Society for an assurance on his life in favour of his wife, the present plaintiff, and a policy or certificate was issued in her favour. If the policy in question had issued to a stranger or such other beneficiary or benefi-

aries as the said James Thorburn Fisher should in his lifetime designate in writing indorsed on the certificate and in default of any such designation to his legal representatives I could understand the construction placed upon it by the learned trial Judge to the extent of holding that the declaration was revocable, but in my judgment the policy in this case operated as a settlement in trust for his wife and placed it entirely beyond his control.

The society must be presumed to know the law and we find them using a printed form in which the plaintiff, described as his wife, is designated as the beneficiary. I scarcely understand the learned Judge when he says: "There is no designation, either on the face of the certificate or elsewhere, constituting Mrs. Fisher a beneficiary." It could scarcely be necessary for the deceased, after applying for the assurance in favour of his wife and after the policy had issued in that form, to go through the most unnecessary form of writing on the policy "I declare Mrs. Fisher to be a beneficiary under this policy," although if she had been a stranger and not his wife he might have defeated her claim by designating another person as beneficiary, but he had no power to defeat her claim except by non-payment of the premiums.

But the deceased treated the policy as if it had been issued in his favour and instead of designating any person as a beneficiary he professed to assign it absolutely to his brother, although by a contemporaneous memorandum it was taken only as security.

The learned Judge says: "I cannot view the statement in the application that the money was to be paid to the plaintiff as affecting the matter. There is no contract between the deceased and the plaintiff; nor between the plaintiff and the society," but this surely is losing sight of the provision of the statute which declares that such a policy operates as a settlement in favour of the wife of the money secured by the instrument, nor was any rectification necessary, and I do not agree with the learned Judge

Judgment.

BURTON,
C.J.O.

Judgment. that the deceased had a right to revoke this trust in favour of his wife. It comes within the very terms of the statute making it an irrevocable trust.

BURTON,
C.J.O.

Whichever way this case is decided it will operate harshly upon some one, but the defendant had the certificate in his possession, saw that it was issued in favour of the wife, and was bound to know the law. The wife, on the contrary, was under the impression that the policy was payable to the defendant, and, subject to the payment of his charge, was available for the payment of her husband's debts.

So late as November, 1895, the defendant wrote to the plaintiff: "The policies in the Commercial Travellers' Mutual Benefit, both here and in Toronto, are payable to me," and she does not appear to have become aware of the actual facts until shortly before the commencement of this action. She was, therefore, authorizing the payment of the sums referred to under the impression that the money belonged to her husband's estate and was properly applicable to his debts, and what she said or did under such circumstances cannot be treated as a ratification or recognition of the payments as binding upon her. If the defendant had, as he should have done, advised her that she was the person entitled to the policy moneys, and she had then chosen to ratify his claim and assent to the payments, a very different case would have been presented. As it is, I think the deceased had no power to make the transfer, and the plaintiff is entitled to recover the money which the defendant wrongfully received.

The plaintiff's counsel consented that the moneys advanced by the defendant for premiums should be deducted.

The appeal therefore should, in my opinion, be allowed and judgment entered for the plaintiff for the amount less the premiums and interest upon them from the time they were advanced.

MACLENNAN, J.A. :—

Judgment.

MACLENNAN,
J. A.

I agree with the judgment of the Chief Justice that if this case had depended on the last ground on which the learned Judge has placed it it could not be upheld. The appellant cannot be estopped by anything she said or did while in ignorance, as she was, that her name was mentioned in the certificate; or while she believed what the defendant had written to her nine days after her husband's death, that the policy, that is the certificate, was payable to him.

The real difficulty in the appellant's way is the language of the certificate. It was issued on the 19th of May, 1888, a short time after the Act 51 Vict. ch. 22 (O.) extending the Act relating to insurance for the benefit of wives and children, R. S. O. (1887) ch. 136, to the certificates of benevolent societies. The application is dated on the 8th of May, and to question 10, "Give full name and relationship of the person or persons to whom you desire your death loss paid," the answer is, "Wife, Agnes E. E. Fisher." There is nothing else that is important in the application. The constitution and by-laws of the society declare that its object is to provide for the payment of benefits to families, heirs, or legal representatives of its deceased members, limited by by-law 13 to \$1,000 in each case. The certificate itself when issued is in the form of a covenant by the society to pay the benefit "to Mrs. Agnes E. E. Fisher, his wife, or such other beneficiary or beneficiaries as the said James Thorburn Fisher may in his lifetime have designated in writing endorsed on this certificate, and in default of any such designation to his legal representatives." I find this designation of the beneficiary by no means easy of construction. There are three beneficiaries mentioned, namely, the wife, the other beneficiary who may be designated in writing endorsed, and the legal representatives. My brother Street in effect thinks there are only two, and that in order to become a beneficiary the wife must be endorsed as such. The best opinion I have formed is that there are three. There

Judgment. are two alternatives, first, the wife, second, such other, etc.;
MACLENNAN, that is to say, the wife may take without being designated
J.A. by endorsement. That follows I think from the words, such other, etc., as etc.; other than who? it must be other than the wife, that is, the wife is excluded from those in whose favour an endorsement may be made. The covenant is to pay the wife, or, some other person, that other person to be designated by endorsement. Then when the endorsement is made, the covenant is to pay the wife or the brother; and the legal representatives are now altogether out of the case, and it is between the wife and the brother alone. Now, having regard to the objects of this society, and the intention of the settlor, who was the covenantee, and from whom the consideration moved, as expressed in his application which is referred to in the covenant, I think its true construction is that if the deceased had made no endorsement in favour of any other person the wife surviving would have taken the benefit. In *Wicksteed v. Monro* (1886), 13 A. R. 486, it was held that where the wife or child, on whom a policy has been settled, dies before the assured the settlement or trust lapses, and the policy becomes the property of the assured himself. So I think the meaning of this policy is that it is for the wife, but if the wife should die before the husband, or, in other words, subject to the wife's right, the member may designate some one else as the beneficiary, and in default then it is to go to his personal representatives.

The effect of *Wicksteed v. Monro* is that a declaration under the Act in favour of wife or child is not a complete disposition of the policy; there is a contingent reversion in the settlor, in the event of his surviving the wife or child. Therefore, in the present case, although in his application the deceased designated his wife as the only beneficiary, it was proper in the certificate itself to provide for the case of her not surviving her husband. The certificate begins by referring to the application and the representations contained therein; and I think such a construction should if possible be put upon the certificate as to har-

monize the two instruments. The construction of my brother Street disappoints altogether the intention of the husband as expressed in the application ; for in his view the wife never had any interest at all, and could not have any, unless designated by indorsement. To hold that the wife took an interest only until her husband designated some one else by endorsement would enable him to defeat the trust which he had created, and which he had clearly intended by the terms of his application to make indefeasible. While the construction which I think is the correct one is consistent with the settlor's intention, and with the spirit of the Act, which is that such settlements once made are beyond the control of the settlor, it is also consistent with the endorsement made by the deceased in favour of the defendant, whereby he assigns to him, not the whole policy, or the whole interest therein, but only his own right, title and interest therein, that is, as I conceive, his contingent interest, in the event of his surviving his wife.

Judgment.

MACLENNAN,
J.A.

Although this is the best conclusion to which I have been able to come, I cannot say that I am free from doubt. The covenant is with the husband, the consideration comes from him alone. The covenant when endorsed as it is, is to pay the wife or the brother. If the terms of the application and the Act relating to insurances for the benefit of wives and children are left out of view, the society might pay either the one or the other ; and having paid the brother, the obligation would be discharged. I think, however, the application and the Act cannot be disregarded and that the plaintiff is entitled to recover.

OSLER, J. A. :—

The right of a person who desires to effect an insurance on his own life in any lawful manner, subject to such terms and upon such conditions as he pleases and as the insurance company assent to, or to settle it at his will and pleasure by means of any other instrument outside the four corners of the contract of insurance itself, is not

Judgment.
OSLER,
J.A.

restricted by the Act, R. S. O. (1887) ch. 136, the provisions of which are now found in the Ontario Insurance Act, R. S. O. ch. 203, sec. 159 *et seq.* The effect of these provisions is to enable a person to insure his or her life in the manner prescribed and to free such insurance from the claims of creditors and exempt it from his own control save to the extent permitted by the Act.

Such an insurance is one where by the contract of insurance itself or by some instrument in writing attached to or endorsed on it or sufficiently identifying it the assured declares that the insurance money is to be for the husband, wife, children, grandchildren, or mother of the assured. In that case the contract or declaration, by the terms of the Act, creates a trust in favour of the beneficiary according to the intent so expressed or declared. That is what is authorized by the Act and the consequence of it if done.

It is not necessary that the policy or other instrument should be expressed to be made in pursuance of the Act. If it is such a policy or declaration as is mentioned in the Act that is sufficient: *Holt v. Everall* (1876), 2 Ch. D. 266.

That is not the case here. There is nothing in the Act which prevents the assured, when effecting the insurance or while the subject remains in his own power, from attaching such condition as he pleases to any settlement he may, by the policy or otherwise, be minded to make upon any of the persons mentioned in the Act, or from retaining by the terms of the settlement an interest in the property, or a right to revoke, alter, or modify the settlement. Such an instrument takes effect in accordance with the general law; it is not one within or protected by the Act.

In the case at bar I agree with Street, J., that in construing the instrument we can derive no assistance from the application. The certificate does not import the application into it or make it part of its terms, and it is those terms alone which we have to construe. We are bound to assume that the assured was satisfied

with the form in which it issued, though, as regards the beneficiary, it varied from the request made by the application: *Yelland v. Yelland* (1898), *ante* p. 91. I also agree with my learned brother that Mrs. Fisher, the wife of the assured, is not named therein as the beneficiary. That might have been but was not done, for the contract of the company is to pay, not "to Mrs. Agnes E. Fisher, his wife," but "to Mrs. Agnes E. E. Fisher, his wife, or such other beneficiary or beneficiaries as the said James Thorburn Fisher may in his lifetime have designated in writing endorsed on this certificate, and in default of any such designation to his legal representatives."

The Act does not forbid such a contract or settlement, but it is not one, even *prima facie*, within the Act, and we have no right, in my opinion, to construe it by the Act or otherwise than as if the name of a stranger instead of the wife had been inserted in the clause above quoted. By the terms of the policy itself, the designation of the wife as beneficiary is qualified by the reservation of the right of the settlor to name some other person or persons as such, and this he has done by the assignment to the defendant endorsed upon the policy and the direction that payment is to be made to him. To say that because he thereby purports only to assign his right and interest he assigned merely such right or interest as he would have had had he survived his wife seems hardly to advance the argument, because the question is whether by the terms of the policy and by force of the statute the wife became the beneficiary. If she did not he could control its disposition to the full amount insured.

Another view of the construction of the instrument is that which has recommended itself to my brother Street, viz., that the gift over to the assured's legal representatives is inconsistent with the construction that Mrs. Fisher is by the policy a designated beneficiary, and requires the construction that such beneficiary, whether it be Mrs. Fisher or some other person, shall be designated by endorsement on the policy, and this so far as she is concerned has not been done.

Judgment.

OSLER,
J.A.

Judgment.

**OSLER,
J.A.**

I may observe that it was held by this Court in *Swift v. Provincial Provident Institution* (1890), 17 A. R. 66, that the Act to secure to wives and children the benefit of life assurance applied to insurances in societies incorporated under the Benevolent Societies Act, R. S. O. (1877) ch. 167, R. S. O. (1887) ch. 172, without the aid of the declaratory Act 51 Vict. ch. 22 (O.). That is recognized by the Insurance Corporations Act, 1892, 55 Vict. ch. 39, sec. 37 (O.).

I think that the defendant became the owner of the policy, subject to the right of the assignor and of his representatives to redeem it.

The appeal should therefore be dismissed.

Appeal allowed, OSLER, J.A., dissenting.

R. S. C.

Dwyre v. Ottawa.

Injunction—Interlocutory Order—Balance of Convenience—Municipal Corporations—By-laws Regulating Procedure.

A by-law of a municipal corporation, passed under section 283 of the Consolidated Municipal Act, for the purpose of regulating procedure, requiring work exceeding \$200 in value to be done by contract after tenders had been called for, was, on the acceptance of duly advertised tenders for the construction of a pavement on a particular street, disregarded by the council stipulating in accepting the tenders that the contract should be held to cover and include the construction during the year of any similar pavement on other streets at the same prices and terms. In pursuance of this stipulation, the contractors entered into other contracts with the corporation, and proceeded with the work by opening up other streets and otherwise, when they were enjoined from proceeding by an interlocutory order in an action by a ratepayer :—

Held, that as the applicant's legal right was not clear, and as serious loss and public inconvenience would necessarily result from granting the order, while no irreparable loss would result from refusing it, the interlocutory injunction should not have been granted.

Validity of proceedings not taken in accordance with the provisions of a by-law for regulating the proceedings of the council or committee thereof, considered.

Re Wilson and Ingersoll (1894), 25 O. R. 439, referred to.

Judgment of ROBERTSON, J., reversed.

THIS was an appeal by the defendants from the judgment of ROBERTSON, J. Statement.

The following statement of the facts is taken from the judgment of OSLER, J. A. :—

The plaintiff, who is a ratepayer of the city of Ottawa, on the 13th July, 1897, commenced this action against the corporation of the city of Ottawa and the Canadian Granite Company of Ottawa (Limited), claiming an injunction to prevent the defendants from proceeding with the construction of asphalt or other pavements on certain streets in the city of Ottawa. This was followed by a notice of motion for an injunction to restrain the defendants from carrying on in any way the work then being done by the defendants the Canadian Granite Company in connection with the laying of asphalt or other pavements on certain specified streets, and to restrain the defendants the city from paying anything on account of the work, and to

Statement. restrain both defendants from commencing any such work on Metcalf street until after tenders should have been advertised for the same for at least ten days, etc. The ground specially alleged in the notice was that "the contract for the works had been given to the defendants the Canadian Granite Company without tenders for the work having been advertised for, and in violation of by-law 1,073, entitled "By-law for the regulation of committees and other matters."

The affidavits filed in support of the motion disclosed the following facts: Prior to the 26th of May, 1897, the board of works committee of the city council, in accordance with the provisions of city by-law No. 1,073, advertised for tenders for paving Bank street with asphalt between Maria and Ann streets. Several tenders were received, among them being that of the defendants the Canadian Granite Company. The committee, which consisted of five members, one of whom was Alderman J. C. Roger, the manager of the Granite Company, reported the tenders to the council and recommended the acceptance of that of the Granite Company, which was the lowest. A meeting of the council was held on the 3rd of June, 1897, at which the report was considered and a resolution was passed in the following terms: "Moved by Alderman Wallace, seconded by Alderman Butler, that report No. 8 of the Board of Works just read be received and adopted conditionally upon the successful tenderers agreeing that in the event of any other rock asphalt pavement being constructed by the city this year it shall be held to be covered by and included in the contract for Bank street on the basis of the same prices and conditions." The resolution was carried on a division of fourteen to five, Alderman J. C. Roger not voting, or taking, if present, any part in the proceedings of the council.

At this time the council had already resolved to lay asphalt pavements of the character specified for Bank street upon the other streets mentioned in the notice of motion, during the year 1897.

Shortly after the resolution was passed, viz., on the 10th of June, 1897, a contract was entered into between the corporation of the city and the Granite Company for the construction of the pavement on Bank street, and by the same instrument the company covenanted with the corporation to construct any additional asphalt pavement which might be required to be done during the same year under local improvement by-laws to be passed by the council therefor. Statement.

Local improvement by-laws were soon afterwards passed for the construction of pavements on Metcalf street, Queen street, and Wellington street, and contracts for the execution of these works were entered into between the defendants pursuant to the above resolution and the terms of the contract of the 10th of June, 1897.

The work on the contracts was being proceeded with, and on some of the streets a considerable part of it had been done, before the commencement of the action.

The plaintiff and his solicitor deposed to their information and belief that if tenders had been called for the work on Metcalf, Queen and Wellington streets could have been done at much lower prices than the lowest tender for the work to be done on Bank street; that the other works were given to the Granite Company in order to avoid competition and through the manipulation and manœuvring of J. C. Roger, the manager of the company and member of the corporation and of the Board of Works. A second affidavit of the plaintiff stated that there was no urgent necessity for the work being performed during 1897, and that it was initiated and the petitions procured through the manipulation and wire-pulling of Edward Wallace, the chairman of the Board, and of Roger, the manager of and principal owner of the stock in the Granite Company, who believed the present council of the corporation to be favourably constituted for their purpose, which was to secure for the company as much work as possible at their own price and without competition. On behalf of the defendants was filed the affidavit of Mr. Surtees, the

Statement. city engineer, who deposed that he had advised the course adopted by the resolution of the 3rd of June as one which, from his experience, he considered best and most likely to secure other works of the same character which the council might require to be done during the year being done at the lowest prices; that the persons owning property on Queen street petitioned that the pavement on that street might be done at the same prices as that for which the Bank street work was to be done, and those who owned property on Wellington street personally requested it to be done for like prices. It was further stated by Mr. Surtees, his affidavit being sworn on the 17th of July, that on Queen street, between O'Connor and Metcalf streets, the street was ready for putting on the asphalt covering, and until that was done the street would be impassable; that the work on Wellington street was in an unfinished condition, the half of the street being excavated and the street railway relaid, but only the concrete foundation commenced, and meantime and until completion of the work one-half of the width of the street would remain impassable for waggons and general travel; that the work on Bank street was considerably advanced, the same having been commenced about two weeks before. The engineer further deposed that before the works were let he certified to the council and his opinion still was that the prices of the Granite Company were reasonable and the lowest at which the works could be done by responsible contractors who would guarantee them, as this company had done, for fifteen years.

Other affidavits disclosed the serious loss, inconvenience and expense which was likely to be incurred by the public, the corporation and the company if the works under the contracts should be interfered with.

The order of Mr. Justice Robertson, made on the 27th of July, 1897, restrained the defendants until the trial or other final determination of the action from continuing, proceeding with, or carrying on the works on Queen street and Wellington street, and restrained the defendants the

corporation from paying anything to their co-defendants on account thereof. The defendants were also restrained until the trial from commencing, continuing, or carrying on any pavement work on Metcalf street, and the defendants the council were restrained until the trial from entering into any contract for the construction or laying of asphalt or other pavements and from themselves constructing such works exceeding \$200 in value until after tenders should have been advertised for the same for at least ten days or called for in such other manner as the extent and importance of the work might render necessary. Statement.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 21st of January, 1898.

Wallace Nesbitt, and *H. E. Rose*, for the appellants.

McCarthy, Q.C., and *D. L. McCarthy*, for the respondent.

March 15th, 1898. OSLER, J. A. :—

It is quite manifest that this order cannot be supported.

An order which enjoins for an indefinite period the execution of an important work clearly within the general jurisdiction of the council, the stoppage of which, under the circumstances, must cause great public inconvenience and serious loss to some one, ought not to be made but upon the clearest evidence of wrong-doing on the part of the council, such, *e.g.*, as was shewn in *Re Baird and Almonte* (1877), 41 U. C. R. 415, or of the illegality of their proceedings.

There is absolutely no evidence of the charges so freely and loosely made in the affidavits of the plaintiff and his solicitor of "manipulating," "manceuvring," and "wire-pulling," on the part of the company or any member of the council. It was an impropriety on the part of both these deponents to make such imputations, knowing, as it must now be assumed that they did know, that they were

Judgment. unable to produce, as they did not attempt to produce, any
OSLER, evidence in support of them. Their affidavits, indeed,
J.A. ought to have been disregarded entirely, as the deponents
swear simply to their information and belief and do not
state, as the rule of Court requires, what are the grounds
of it: Consolidated Rule 518; *Quartz Hill Consolidated
Gold Mining Co. v. Beall* (1882), 20 Ch. D. 501, 508; *Bidder
v. Bridges* (1884), 26 Ch. D. 1, 5, 8.

It is true that Alderman J. C. Roger did, as a member of the Works Committee, sign, together with the other members of the committee, the report of the 3rd of June, recommending the acceptance of the tender for the Bank street paving. This he ought not, even as a matter of form, to have done, but that contract is not attacked and he is shewn to have taken no part in the resolution of the council by which it was authorized.

The plaintiff is therefore confined to the single objection, that the contracts for paving on Metcalf street, Queen street, and Wellington street are illegal, because they were made in contravention of the 51st and 52nd clauses of city by-law 1,073, "By-law for the regulation of committees and other matters." This is a by-law passed under the authority of section 283 of the Municipal Act, which enacts that every council may make regulations not specifically provided for by the Act and not contrary to law for governing the proceedings of the council, the conduct of its members, the appointing and calling of special meetings of the council, and generally such other regulations as the good of the inhabitants of the municipality requires, and may repeal, alter, and amend its by-laws save as by the Act restricted. The 51st clause of the by-law, under the heading "Tenders," provides that all work and materials exceeding in value \$200 shall be done and provided by contract, and after tenders have been advertised for at least ten days, or called for in any other manner which the extent and importance of the work may, in the discretion of the committee having charge of the matter, render necessary.

In case of an emergency, rendering it necessary to dispense with this rule, such dispensation shall require the sanction of a majority of the committee having charge of the matter. Such case is to be entered in the minutes of the committee and reported to the council at its next meeting, with reasons for dispensing with the rule.

Clause 52 provides certain regulations to be observed in regard to tenders.

Clause 53. Notwithstanding anything in the two preceding clauses, the council may, by resolution to be passed by a majority of the whole council, direct that any particular work may be done by day labour instead of by contract.

By section 18, sub-section (1), it is the duty of the Board of Works to consider and report on all matters relating to sewers, drains, streets and thoroughfares.

It was argued on behalf of the defendants that the 51st clause was intended to govern the proceedings of the committee and not of the council as a whole. Something may be said in favour of that view, particularly as there is nothing in the by-law which explicitly restrains the council from taking up in council business which they have for the sake of convenience delegated to be disposed of in general by a committee of their body.

But, waiving that question, it is clear that it was in the power of the council by a bare majority, since no restriction requiring more than a bare majority is imposed upon them by the by-law itself, to repeal the by-law or any particular clause or clauses of it. It was equally within their power to repeal it *pro hac vice* by overriding it by a by-law inconsistent with any regulation imposed by it.

Having that power, it appears to me that even had the plaintiff proved that no such by-law had been passed it would have been inexpedient and out of the usual course of the Court to interfere by injunction, considering that the defect was merely in a matter relating to the internal regulation of the council, that it could easily be remedied or the objection removed by the passage of a by-law, that the in-

Judgment.

OSLER,
J.A.

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OSLER,
J.A.

convenience to the public caused by stopping the work in the state in which it then was would be enormous, and that the loss and injury to the defendants in the event of the failure of the plaintiff to maintain his action would be altogether disproportionate to any relief the latter was likely to obtain were he successful : *Elwes v. Payne* (1879), 12 Ch. D. 468, at p. 479 ; *Mitchell v. Henry* (1880), 15 Ch. D. 181, at p. 191.

The plaintiff has not proved the absence of such a by-law. He has, on the contrary, shewn that contracts have been entered into for the construction of the works. We are not to assume that they have been entered into or authorized otherwise than in accordance with the provisions of the 282nd section of the Municipal Act, viz., under the authority of a by-law of the corporation : *Waterous Engine Works Co. v. Palmerston* (1892), 21 S. C. R. at p. 576 ; *Wigle v. Kingsville* (1897), 28 O. R. 378. If they were, the plaintiff's case necessarily fails, for reasons above mentioned. If they were not, it was for the plaintiff to make that clear, because in an attack of this kind he must, as it has been expressed, "stop all the earths," and ought to be confined to the precise objection he has taken, namely, that the council could not contract for the works in question otherwise than by tender.

The case of *Re Wilson and Ingersoll* (1894), 25 O. R. 439, cited by counsel for the plaintiff, is distinguishable on the ground that the by-law there in question had not been passed by the requisite majority, a two-thirds vote of the whole council, over the requirements of the general by-law regulating the proceedings of the council. The by-law would seem to have been held bad on some other grounds also. The case is not very clearly reported, and it is unnecessary to say whether I agree with it on the point for which it is cited.

The appeal should, in my opinion, be allowed, and the order for the injunction discharged with costs here and below.

MOSS, J. A.:—

Judgment.

Moss,
J.A.

It is not necessary in dealing with this interlocutory order to make any forecast of the result at the trial. The only question for decision at present is whether there was made out any such case as should have induced the Court at this stage of the action to interfere with the dealings of the defendants the corporation of the city of Ottawa, in a matter in respect of which their general jurisdiction is unquestioned.

The plaintiff's motion for an injunction was supported in the first instance by his own affidavit. The charges made therein of fraudulent and improper conduct on the part of Alderman J. C. Roger were based on information and belief, without disclosing the grounds of belief, which must be done in order to render the statements admissible, even on an interlocutory motion: Consolidated Rule 518.

This affidavit was supplemented by one made by the plaintiff's solicitor, but it is open to the same objection.

There was really no evidence produced by the plaintiff in support of these charges.

It was unfortunate that Alderman J. C. Roger, having regard to his relations to the defendant company, should have put his signature to the report of the Board of Works, of the 3rd of June, 1897, recommending the acceptance of the company's tender. But the contract awarded upon that tender is not now questioned. On the contrary, in the reasons against the appeal it is stated that the contract for that work was properly awarded under section 51 of by-law 1073 and is not objected to.

The contracts objected to are those awarded pursuant to the resolution of council passed on the 3rd of June on the motion for adoption of the report of the Board of Works. It is quite plain on the evidence before us that Alderman J. C. Roger did on that occasion observe the prohibition contained in section 77 (2) of the Municipal Act, 1892, and did not vote on that motion or on the resolution then adopted.

Judgment.

Moss,
J.A.

The remaining ground is the objection that the awarding of the contracts was a violation of clause 51 *et seq.* of by-law 1073. Even if the plaintiff's right to succeed at the trial on this ground was made more apparent than is shewn on the material there would still remain the question whether he shewed that if the defendants were permitted to continue the acts complained of it would be likely to result in such irreparable injury to the plaintiff as to call for the interposition of the Court by means of an interim injunction.

The rules governing applications of this kind are well settled. Where the legal right is not sufficiently clear to enable the Court to form an opinion it will generally be governed in deciding an application for an interim injunction by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the order.

And where it appears that greater danger is likely to result from granting than withholding the relief, or where the inconvenience seems to be equally divided as between the parties, the injunction will not be granted.

Perhaps the cautious policy expressed by Lord Cottenham in *Brown v. Newall* (1837), 2 M. & C., at p. 570, need not be fully adopted but it may not be inadvisable to bear in mind that while "it is absolutely necessary that the power and discretion of the Court to grant injunctions should exist because there are cases in which it is indispensable" it is not to be exercised where such exercise may be productive of positive injustice to the parties enjoined for which there may be no adequate compensation.

In this case the stoppage of the works in question, thereby leaving some of the principal highways of the city of Ottawa in a dangerous and almost impassable condition, the danger to which the public using these highways were thus exposed, the inconvenience resulting from such a condition of things, and the loss entailed on the parties to the contracts, outweigh any possible injury or loss to the plaintiff that can be suggested: *Elwes v. Payne* (1879), 12 Ch. D. 468.

As a question of comparative injury, I am convinced that the balance preponderates in favour of the defendants, and I am of opinion that the injunction should not have been granted under the circumstances.

Judgment.
Moss,
J.A.

BURTON, C. J. O., and MACLENNAN, J. A., concurred in the result.

Appeal allowed.

R. S. C.

ST. DENIS V. SHOULTZ.

Malicious Prosecution—Reasonable and Probable Cause—Advice of Counsel.

That the prosecution in question was instituted on the advice of counsel is not sufficient to protect the prosecutor if he does not exercise reasonable care to ascertain and lay before counsel the facts in reference to the alleged offence.

Absence of reasonable and probable cause for the prosecution is not by itself sufficient to impose liability; malice must exist, and the question of malice must be left to the jury.

Judgment of FERGUSON, J., reversed.

THIS was an appeal by the defendant from the judgment of FERGUSON, J., in favour of the plaintiff, in an action for malicious prosecution. Statement.

The plaintiff was the tenant of the defendant's farm under a lease for two years from the 1st of January, 1896, and on the 18th of November, 1896, it was agreed between the plaintiff and the defendant that the farm should be given up in January, 1897. On the 13th of January, 1897, a distress warrant was issued by the plaintiff for rent due on the 1st of January, 1897, and the bailiff was unable to find anything distrainable. On the 16th of January, 1897, an information was sworn to by the defendant charging the plaintiff with having fraudulently removed and disposed of his goods and the plaintiff was arrested. The charge was heard on the 19th of January, 1897, and dismissed.

Statement.

The action was tried at Sandwich on the 18th of March, 1897, before FERGUSON, J., and a jury, who found in favour of the plaintiff and assessed the damages at \$350, and gave a verdict of \$125 for the defendant on a counter-claim for rent, and judgment was directed to be entered in accordance with these findings.

The defendant appealed and the appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 2nd of February, 1898.

M. K. Cowan, for the appellant.

W. H. P. Clement, for the respondent.

March 15th, 1898. The judgment of the Court was delivered by

OSLER, J. A. :—

The defendant contended that he had reasonable and probable cause because he had acted upon the advice of his solicitor before whom he had laid the facts then known to him and on which he relied.

These facts were that the plaintiff had used some expressions shewing his intention not to pay the defendant his rent and that he had made a bill of sale of the property on the farm to his sons. The bailiff intrusted with the distress warrant had reported this to the solicitor and a neighbour had told the same thing to the defendant. The defendant asked the solicitor what he could do or what was best to be done, and the solicitor advised him, relying, as he said, upon the case of *Regina v. Henry* (1891), 21 O. R. 113, that the plaintiff could be prosecuted under the 368th section of the Code for disposing of his property with intent to defraud his creditors. No enquiries were made as to the date of the bill of sale or the circumstances under which it had been given, and in fact the date was not known to the defendant

or his solicitor when the information was laid. It turned out to have been made in September, 1895, some months before the date of the lease, and thus was not a conveyance or transfer of property which could possibly have been made for the purpose of defrauding the defendant. The learned Judge held that although the defendant had communicated to his solicitor the facts then known to him, yet that inasmuch as he had not taken reasonable care to inform himself of the date of the bill of sale, a fact which could readily have been ascertained by enquiry, he was not protected by the advice of the solicitor, and therefore that there was no reasonable and probable cause for him. It was not suggested at the trial that the question whether the defendant had taken reasonable care to inform himself of the true state of the case was a question in dispute to be determined by the jury, and perhaps so far as the evidence was elicited it can hardly be said to have been so, though there is something which suggests that the bailiff's report was of a bill of sale which had been recently executed. At all events the learned Judge assumed without objection that there had been such want of reasonable care on the defendant's part, and therefore that there was no reasonable or probable cause for the prosecution. If that assumption was proper, as it must for the present be taken to be, I think the learned Judge was right in ruling that the defendant was not protected by the solicitor's advice based upon what really was an incomplete statement of the facts. How far such advice honestly acted upon is a shield for the prosecutor may be seen by the recent case of *Horsley v. Style* (1893), 9 Times L. R. 605.

While, however, I see no reason to disagree with the trial Judge's ruling on this point (so far as the evidence was admitted), I think that in another respect an error has occurred which makes a new trial inevitable. In cases of this kind as it has frequently been said a plaintiff must prove three things: first, that the prosecution has terminated in his favour; second, that it was without any reasonable and probable cause; and, thirdly, what is quite

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OSLER,
J.A.

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J.A.

as important as either of the other two, that the defendant was actuated by malice, that is, that the proceedings were initiated in a malicious spirit, *i.e.*, from some indirect and improper motive, and not in furtherance of justice. On this part of the case the jury were not instructed at all. They were told that there being no reasonable or probable cause, nothing remained for them but to say what damages the plaintiff should have and how much should be awarded to the defendant for rent upon the counterclaim.

Now, while it cannot be said that the non-existence of probable cause may not be some evidence from which the jury may infer malice, it is in the circumstances of this case very slight evidence indeed.

An observation of Bowen, L. J., on this subject in *Brown v. Hawkes*, [1891] 2 Q. B., at p. 727, is pertinent: "It is sometimes said that the non-existence of reasonable and probable cause is some evidence from which the jury may infer malice. This is based upon the idea referred to in what Lord Mansfield says in *Sutton v. Johnstone* (1786), 1 T. R. 493, 545, viz., that if there is an absence of reasonable and probable cause the jury may think that the defendant knew there was no probable cause."

There is a passage in the defendant's evidence which may or may not be regarded as evidence of malice according as it is viewed as relating to the distress warrant or the arrest. To me it seems to refer to the former and to be a very innocent remark. There is on the other hand much evidence which might lead the jury to find that the defendant was not actuated by malice: that he really did honestly believe that the plaintiff had made away with his property in order to defeat or defraud him, and that he instituted the proceedings—if carelessly—yet in good faith, and on the advice of his solicitor. These are all circumstances which the jury may take into consideration on the question of malice, though the Judge has been unable to give effect to them on that of reasonable and probable cause.

I refer to *Hicks v. Faulkner* (1878), 8 Q. B. D. 167; *S. C.*, 46 L. T. N. S. 127, 130; *Abrath v. North-Eastern R. W.*

Co. (1883), 11 Q. B. D. 440; *Archibald v. McLaren* (1892), 21 S. C. R. 588, which the parties will do well to consider before the next trial if they do not wisely agree in the meantime to settle their differences. The appeal must be allowed with costs. The new trial should be without costs, *i.e.*, of the last trial, as neither of the parties brought the above authorities to the notice of the learned trial Judge, and there was no objection to the charge.

Judgment.

OSLER,
J.A.

Appeal allowed.

R. S. C.

IN RE TORONTO RAILWAY COMPANY ASSESSMENT.

Assessment and Taxes—Toronto Railway Company—Rails, Poles and Wires—Highways—Street Railway.

The rails, poles and wires of the Toronto Railway Company, used by them in operating their electric railway, and laid and erected in and upon the public highways of the city of Toronto, are subject to assessment under the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.), BURTON, C. J. O., dissenting.

Toronto Street R. W. Co. v. Fleming (1875), 37 U. C. R. 116, has been overruled by *Consumers' Gas Co. v. Toronto* (1897), 27 S. C. R. 453.

THIS was an appeal by the city of Toronto from the judgment of the Judges of the County Courts of York, Ontario, and Peel, on an appeal to them from the Court of Revision for the city of Toronto under the Consolidated Assessment Act of 1892. Statement.

The question in dispute was whether the rails, poles, and wires of the Toronto Railway Company, used by them in operating their electric railway, and laid and erected in and upon the public highways in the city of Toronto, were subject to assessment under the Consolidated Assessment Act of 1892.

Dartnell and McGibbon, Co. JJ., held that the rails, poles, and wires, were not subject to assessment, while

Statement. McDougall, Co. J., dissented, holding that the question was settled by *Consumers' Gas Co. v. Toronto* (1897), 27 S. C. R. 453.

In view of the importance of the question and the conflict of opinion, and because of there being some doubt as to the right to appeal, the Lieutenant-Governor-in-Council stated a case for the opinion of the Court, asking the same question.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 31st of January, and 1st of February, 1898.

Robinson, Q.C., and *Fullerton, Q.C.*, for the appellants. *Toronto Street R. W. Co. v. Fleming* (1875), 37 U. C. R. 116, has been overruled by *Consumers' Gas Co. v. Toronto* (1896), 23 A. R. 551, (1897) 27 S. C. R. 453, which is decisive of this case. At any rate *Fleming's* case is distinguishable, the wording of the present Assessment Act being wider than that of the Act in force when that case was decided. See also *Rex v. Brighton Gas Light Co.* (1826), 5 B. & C. 466; *Rex v. Chelsea Water Works* (1833), 5 B. & Ad. 156; *Regina v. West Middlesex Water Works* (1859), 1 E. & E. 716; *Metropolitan R. W. Co. v. Fowler*, [1893] A. C. 416.

McCarthy, Q.C., and *Laidlaw, Q.C.*, for the respondents. Under the Assessment Act only two classes of property are assessable: (a) land; (b) personal property. That rails, poles and wires are not land is too much of a truism to require argument. The personal property of the respondents is not liable to assessment: Consolidated Assessment Act, 1892, sec. 34 (2). The rails, poles and wires are laid and erected upon the public highways of the city of Toronto, which are vested in the Crown, and the respondents have neither any estate in the highways, nor any exclusive right of occupancy of them. The *Consumers' Gas Company* case is distinguishable, for there there was exclusive occupancy. The land of the Crown is

exempt from taxation: Consolidated Assessment Act, **Argument.** sec. 7 (1), and every public road and way or public square is also exempt: Consolidated Assessment Act, sec. 7 (6). The respondents cannot be assessed as occupants of Crown lands under the Consolidated Assessment Act, sec. 7 (2), inasmuch as they have no exclusive occupation of any part thereof. They are merely licensees from the city of Toronto, and the right of a licensee is not assessable. If they have any greater estate in the land forming the public highways of the city of Toronto than that of licensees, it must be that of tenants of the city, and the taxes would therefore be payable by the city, which would be taxation in a circle and therefore void: Consolidated Assessment Act, sec. 24. Whether this is the true construction of the Act or not, it has been settled for more than twenty years that the rails are not liable to assessment: *Toronto Street R. W. Co. v. Fleming* (1875), 37 U. C. R. 116, and the agreement between the appellants and respondents was based upon this settlement of the law. The Court should not now overrule its own decision and destroy the basis upon which the parties contracted.

Robinson, Q.C., in reply.

March 15th, 1898. OSLER, J.A. :—

The arguments addressed to us in this case have received the best attention I have been able to give them, and I have read and carefully considered the judgments of the learned Judges of the Supreme Court in *Consumers' Gas Co. v. Toronto* (1897), 27 S. C. R. 453, and the judgments delivered in this Court in the same case and in *Toronto Street R. W. Co. v. Fleming* (1875), 37 U. C. R. 116. I was of opinion in the *Consumers' Gas Company* case that it was not distinguishable from *Fleming's* case, the fact that the one concerned pipes laid in the street under ground and the other rails laid on and affixed to the surface of the street making no difference in the principle on which the case fell to be decided, viz., that the pipes in

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OSLER,
J.A.

the one and the rails in the other formed part of the soil of the street and were as such exempt by force of the section of the Assessment Act, which is now section 7, sub-section 6, of the Act of 1892 (erroneously referred to in the head-note of the Supreme Court report as section 6).

I thought then and am still of opinion that the relative sections of our present Act are substantially the same as those of the Act in force when *Fleming's* case was decided.

My view did not meet with acceptance here, and in the Supreme Court the judgment of this Court was affirmed, not as I understand it on any ground precisely taken here in the opinions of the majority. Mr. Justice Gwynne was of opinion: (1) That there was a legislative grant to the gas company of so much of the land of the streets and below the surface as it found necessary to take for the purposes of the company and the convenient use of the gas works; and that it then became the property of the company and liable to assessment as land under the provisions of the Assessment Act. (2) That the exemption clause above referred to had no application except to streets, roads or squares, the soil and freehold of which are vested in some private person or corporation and which would be liable to be assessed against the owner but for the exemption contained in the sub-section. The Chief Justice, Sir Henry Strong, says that he entirely concurs in the judgment of Mr. Justice Gwynne, so far as it goes. Then he adds his own views: (1) That none of the exemptions in section 7 have any bearing on the case. (2) That the gas pipes laid under the streets were under the Act real property belonging to the company and as such liable to assessment. For this he refers to *Metropolitan R. W. Co. v. Fowler*, [1893] A. C. 416, and adds: "No matter in whom the fee in the soil of the surface of the streets was vested, so much of the sub-soil as is occupied by the appellants' pipes must be held to constitute part of the land, unless we are altogether to disregard the decision of the House of Lords in the case cited." Then the learned Chief Justice proceeds to consider *Toronto Street R. W. Co. v.*

Fleming. He says: "The Chancellor attempted to distinguish that case from the present, but I confess I do not think it susceptible of distinction. I was a party to that decision, but I do not hesitate to say that I now think the rails were 'things affixed to the land,' * * and that that case was consequently wrongly determined."

In this opinion of the Chief Justice the reporter adds that Sedgewick, King, and Girouard, JJ., concurred.

We have, therefore, the whole Court determining that the land occupied by the pipes of the gas company, though part of the street, was the land of the company and taxable as such: and secondly, that the exemption clause, section 7, sub-section 6, does not relate to public streets of the character of those on which the mains of the company and the rails of these defendants are laid: and thirdly, a majority of the Court assigning as a further and additional ground of their decision that *Toronto Street R. W. Co. v. Fleming*, which they concede not to be distinguishable from the case before them, and on which my own opinion in the latter case was founded, had been wrongly determined because the rails were things affixed to the land, liable as such to be assessed as real property and not exempt under section 7, sub-section 6, "which had no bearing on the case."

Had the *Consumers' Gas Company* case been decided simply on the ground that the land occupied by their mains was so much land expropriated by them out of the street and as such really no longer part of the street, I might easily have seen my way to hold that *Fleming's* case, dealing as it does merely with rails laid on the surface of the street, the company having no exclusive proprietorship in any part of the street, was untouched. But here we have exactly that case over again and we are told by a majority of the Supreme Court that it is not law and that the exemption clause does not apply. I could only decide in favour of the defendants by holding that it is law and that the exemption clause does apply. I have no right to say, as we were so strenuously urged to do, that

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what is assigned by the majority of the Court as one ground of their decision, is said *obiter*, merely because the whole Court have also assigned an additional and sufficient ground for it: *Redgrave v. Hurd* (1881), 20 Ch. D. 1, 14, 15. And see also *Guardians of Poor of West Derby Union v. Guardians of Poor of Atcham Union* (1889), 24 Q. B. D. 117, at p. 120; *Overseers of Manchester v. Guardians of Ormskirk Union* (1890), 24 Q. B. D. 678, at p. 682. I am bound to hold that *Fleming's* case is overruled and therefore to allow this appeal. I think, however, it should under all the circumstances, be allowed without costs.

This result answers the general question submitted to us by the Lieutenant-Governor-in-Council. I must add that in dealing with this we draw largely upon the general information and knowledge acquired by us in the case of the appeal between the parties; the special case embodied in the order-in-council being of the baldest and most meagre description.

MACLENNAN, J. A. :—

I am of opinion that this appeal, and also the question submitted in the special case, are governed by the judgment of the Supreme Court in *Consumers' Gas Co. v. Toronto* (1896), 23 A. R. 551, (1897) 27 S. C. R. 453, in which *Toronto Street R. W. Co. v. Fleming* (1875), 37 U. C. R. 116, was overruled by the Supreme Court. It was argued that this case was distinguishable from both the *Fleming* case and the *Consumers' Gas Company* case, but I am unable to see that there is any distinction.

I am, therefore, of opinion that the appeal should be allowed, and that the question in the case submitted to us for our opinion should be answered in the affirmative.

MOSS, J.A. :—

I agree with my brother Osler that whatever may have been, or are, our individual opinions we must accept the law as laid down for us by the Supreme Court in *Consumers' Gas Co. v. Toronto* (1897), 27 S. C. R. 453.

I recognize that case as distinctly overruling the decision of this Court in *Toronto Street R. W. Co. v. Fleming* (1875), 37 U. C. R. 116, and as affirming that this Court ought to have determined that the rails of the street railway laid upon and along the highways of the city were, under the provisions of the Assessment Act, 32 Vict. ch. 36, "things affixed to the land" and as such liable to assessment as real property.

Judgment.

Moss,
J.A.

If that should have been the decision under the Assessment Act then in force, it should certainly be the decision under the Assessment Act of 1892, though I confess I am unable to perceive that any material change has been effected by the legislation subsequent to the rendering of judgment in *Fleming's* case.

BURTON, C.J.O. :—

By the Assessment Act of 1892 and the amendments thereto it is provided that where the assessment exceeds \$50,000 there shall be an appeal from the Court of Revision to a board consisting of three County Court Judges, instead of to one Judge as in other cases, and with this difference that whilst the decision of one Judge was to be final and conclusive there is an appeal given to the Court of Appeal from the judgment or decision of the three Judges, but that appeal is apparently final and conclusive although the same question could manifestly come before the Supreme Court in another form.

But the County Court Judges having differed in opinion the Lieutenant-Governor-in-Council has, presumably under 53 Vict. ch. 13 (O.), submitted a case for our opinion as to whether the rails, poles and wires of the Toronto Railway Company are liable to be assessed under the Consolidated Assessment Act of 1892, and on this question there may be an appeal either to the Supreme Court or to Her Majesty in her Privy Council.

If I could be quite clear that the dictum of the learned Chief Justice of the Supreme Court in the recent case of

Judgment. *Consumers' Gas Co. v. Toronto* (1897), 27 S. C. R. 453, was fully adopted by the learned Judges who agreed with him, instead of his conclusion merely, I think it would be our duty, whatever might be our own opinions, to adopt that judgment in its entirety and to hold that the judgment given in this Court about twenty-three years ago in *Toronto Street R. W. Co. v. Fleming* (1875), 37 U. C. R. 116, was no longer binding upon us, but with great respect I am unable to convince myself that the remark of the Chief Justice, although entitled to great weight, is anything more than an *obiter dictum*.

BURTON,
C.J.O.

We find in the first place that the judgment of the Court was based upon the decision of the House of Lords in *Metropolitan R. W. Co. v. Fowler*, [1893] A. C. 416, a case very distinguishable in my judgment from *Fleming's* case; the two might, I think, well stand together. I was also, as well as the Chief Justice, a party to that decision, and on referring to it again after the lapse of so many years I entertain a very strong opinion that it was well decided, but whether well decided or not it is not at all affected by the decision in *Metropolitan R. W. Co. v. Fowler*; the question there arose as to whether the property of the railway company was taxable under the provisions of the Land Tax Act, 38 Geo. III. ch. 5.

The railway company in that case had not a mere license to break up the streets for the purpose of laying their pipes but had power to expropriate the land under the highway, and the interest of the owner of the land being purely nominal and of no actual value they were allowed to expropriate without the payment of compensation, but it is manifest that the land when taken became as much their property as if it had been purchased and paid for. Of course if it had been an easement, as was contended for, or if the view of Lopes, L. J., had been sustained, that it had already been taxed in the taxation of the surface and was not similar to mines or other properties specifically mentioned, it would not have been liable to taxation under the Act in question, but being manifestly

the absolute property of the company, which in their hands had acquired a special value, it was held to be liable.

But that decision, as it seems to me, has no application to the present case and in my opinion the *Fleming* case should be followed unless a change has been made by subsequent legislation.

The *Fleming* case was decided under the Assessment Act of 1869, and I endeavoured to point out in that case the difference between the system of assessment under our Act and under 43 Eliz. ch. 2. I adhere to the view I then took and to the reasons then given for holding that the rails were not liable to assessment and I will not here repeat them.

But it is claimed that the law has been changed and it is even said that that change has been made in consequence of a suggestion made by Mr. Justice Patterson in the *Fleming* case. As the change was made some twelve years later it can scarcely be attributed to any such supposed recommendation but my interpretation of that learned Judge's remarks is that if there were no exemptions he would, under the general words of section 9 "all land and personal property in the Province of Ontario shall be liable to taxation," have no hesitation in "deciding that this was assessable property."

I am of opinion, however, that in this respect no change has been effected in the Act of 1869.

It is said that an important change has been made by the Act of 1892 in this section, which instead of reading as above "all land and personal property in the Province of Ontario" now reads (section 7): "all property in this Province shall be liable to taxation subject," etc.

The first observation that I would make upon this is, that it was made for the first time by the commissioners for revising the statutes in 1887, and is presumably, therefore, their interpretation of the existing law.

Under the 9th section of the Act respecting the Revised Statutes it is provided that the Revised Statutes shall not be held to operate as new laws but shall be construed and

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have effect as a consolidation of the law as contained in the former Acts, but as a matter of precaution the Legislature provided that if upon any point the provisions of the Revised Statutes should not be in effect the same as those in the repealed Acts, then as to future transactions, subsequent to the time of their taking effect, those provisions should prevail, but as regarded all transactions anterior to that time the provisions of the old law should prevail.

This was not of course an authority to, or a recognition of the right of, the commissioners to legislate, but was intended to provide for a contingency which might notwithstanding the greatest care and caution occur.

My view is that no change in the law as it stood was effected or intended to be effected in the revision of 1887.

Taken in connection with the interpretation clause and the exemptions the words used in the original statute and the Revised Statute mean, I think, precisely the same thing; but as the Legislature had used the words "land" in some parts of the Act, in others "real estate" and "real property," in others "property," it became desirable to state precisely the meaning to be given to them respectively. In section 2, sub-section 9, therefore, instead of confining the interpretation to land only, they refer to "land," "real property," and "real estate," respectively, as including all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty, and all trees or underwood growing upon the land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to Her Majesty. In sub-section 10 they define "personal estate" and "personal property," and in sub-section 8 they define "property" as including both real and personal property.

The interpretation of sub-section 9 would seem therefore to cut down the meaning of "real estate" and "real property" to the same as that which it attaches to the word "land," which without any interpretation clause,

would mean the same thing as including every thing erected upon or affixed to or growing upon the land.

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BURTON,
C.J.O.

When, therefore, the revisers substituted the word "property" for "land and personal property" leaving the exemption and the interpretation clauses as they were before, it appears to me that they were acting strictly within their powers and did not intend to, and did not in fact, make any change in the law.

It may possibly be different under the Act of 1892 when the Legislature had full power to make any changes, but it is not out of place perhaps to remark that the Act purports to be a consolidation of the Acts then in force, and if I am right in assuming that no change was effected by the revision then a strong case is made out for holding that the Legislature, which has adopted the same language, did not intend to change the law which had been in force since 1869 and had received a judicial interpretation in 1875 till now unchallenged.

I am free to admit that the mere circumstance that no means are provided for the sale of the interest of the company in the property assessed is not conclusive inasmuch as other means exist of enforcing payment of the tax if legally imposed, still it furnishes a strong argument in my opinion for holding that it is not land within the meaning of the Assessment Act.

In cases where the property is not assessed, as in cases of Crown property, the Legislature has provided that the individual in occupation may be assessed, and if they had intended to make a change in respect of property of this nature we should have expected the change to have been made in some more formal way than merely substituting "property" for "land"—as for instance by providing that the rails though forming part of the real estate to which they are attached should for the purposes of the Act be considered as land belonging to the company. The cases relied upon by the Chancellor in his judgment in the *Consumers' Gas Company* case are all cases, if I mistake not, under the Statute of Elizabeth, where the right to tax

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C.J.O.

the person depends entirely upon the beneficial and exclusive occupation of the land, and I think it likely that upon that ground the gas pipes in that case might have been liable to be assessed for the poor rates in England.

I think that that distinction has not been sufficiently borne in mind when considering our assessment law but the distinction between the two enactments has been very clearly pointed out by my learned brother Osler in his dissenting judgment in that case.

The distinction is a very obvious one. In England, under that Act, the individual is alone assessed in respect of his exclusive occupation. Here the property is alone assessed although under the machinery provided for the collection of the tax the owner is liable—or the owner and occupant if the property consists of a house which may be in the possession of a tenant or occupant.

It seemed to be conceded, and I think properly so, that if the rails were not assessable neither could the poles and wires, which equally form part of the land, be so assessed.

To summarize what I have written:—The remark of Strong, C.J., though entitled no doubt to great weight, was not necessary to the decision and is, I humbly submit, not warranted by the decision in the House of Lords; when, therefore, we come to reconsider the very point decided in *Fleming's* case the doctrine of *stare decisis* should apply and we should not in this Court at least reverse a case which has stood as law for so many years unless now convinced that it was clearly erroneous, or unless the law under which it was decided is no longer applicable. I think, as I have endeavoured to shew, that there is no material change in the law and we should leave the question to be decided by some higher tribunal.

For these reasons, therefore, I am of opinion that the judgment of the County Court Judges should be affirmed.

It follows that in my judgment the answer to the question submitted by his Honour the Lieutenant-Governor is that the rails, etc., are not liable to taxation, but as my learned brothers are of opinion that the dictum of the

learned Chief Justice of the Supreme Court has been adopted by the full Court and is binding upon this Court, the answer will be that they are liable.

Judgment.
BURTON,
C.J.O.

Appeal allowed, BURTON, C.J.O., dissenting.

R. S. C.

LONG V. THE ANCIENT ORDER OF UNITED WORKMEN.

*Insurance—Life Insurance—Benevolent Society—"Renewed Contract"—
55 Vict. ch. 39, sec. 33 (O.).*

It is not a renewal of a contract of insurance within the meaning of sec. 33 of the Insurance Corporations Act, 1892, [55 Vict. ch. 39 (O.)] but a continuance of the original contract, when after default in payment of assessments and consequent suspension of rights, a member of a benevolent society pursuant to the rules of the society, pays the assessments as of right and becomes thereby *ipso facto* reinstated.

Judgment of ARMOUR, C. J., reversed.

THIS was an appeal by the defendants from the judgment of ARMOUR, C. J., at the trial. Statement.

The following statement of the facts is taken from the judgment of OSLER, J. A. :—

The defendants, on the 17th of December, 1891, issued to Thomas Long a beneficiary certificate declaring him entitled to all the rights, privileges, and benefits of membership in their order in Ontario and entitled to designate the beneficiary to whom the sum of \$2,000 of the beneficiary fund of the order should at his death be paid. This certificate purports to be issued on the express condition that Long should in every particular while a member of the order comply with all the rules, laws, and requirements thereof, and upon the further condition that the rights of the person named as beneficiary should be subsidiary to the same rights and privileges, and to no other or greater extent than Long himself could claim

Statement. under the certificate were it made payable to himself personally.

It was also expressed to be understood and agreed that the truth of the statements and conditions set forth in the medical examination and application for the certificate, and which formed a part thereof, were the conditions upon which Long was entitled to the rights, benefits, and privileges of the order, and that any untruthfulness or violation of said statements and conditions terminated Long's membership, and that the Grand Lodge of the order should not then be liable for the said sum or any part thereof. By the application for the certificate bearing the same date, Long agreed with the defendants *inter alia* that compliance on his part with all the laws, regulations and requirements, which were then or might be thereafter enacted by the order, was the express condition on which he was entitled to participate in the beneficiary fund and to have and enjoy all the other benefits and privileges of the order, and he directed that the amount to which he might be entitled of the beneficiary fund should at his death be paid to his mother, Annie Long.

One of the general laws of the order in force at the date of the certificate, "prescribed for the government of the Grand Lodge beneficiary jurisdiction in the collection, management, and disbursement of the beneficiary fund," was (15): "Each and every member of this order shall pay to the financier of his lodge without notice sixteen regular assessments of one dollar each in each calendar year, due and payable as follows: two assessments on or before six o'clock p.m. of the last day of January, April, July, and October, and one assessment on or before six o'clock p.m. of the last day of February, March, May, June, August, September, November and December."

Another rule (15c) provides that "any member failing or neglecting to pay all assessments made upon him for the beneficiary or relief fund to the financier of the lodge of which he is a member within the time prescribed as herein mentioned shall stand suspended from all the rights,

benefits and privileges of the order from and after that date and shall not be reinstated except as herein provided." Another rule (31) provides that "any member failing to pay all assessments made upon him for the beneficiary or relief funds to the financier, etc., on or before the last day of the month in which said assessments are made, shall stand suspended from all the rights, benefits and privileges of the order from and after that date and shall not be reinstated except as herein provided." And rule 38 provides that when a member shall be suspended or expelled from the order for any cause whatsoever he forfeits all rights, benefits and privileges, and his beneficiaries thereby lose all right to any portion of the beneficiary fund.

Statement.

Rule 6, passed in July, 1895, amending rule 15, extended the time for payment of the assessments from 6 o'clock p.m., to 9 o'clock p.m., and as thus altered that rule and the other rules above mentioned as well as those to be afterwards referred to were in force at and from the date of the certificate up to the death of Thomas Long, which occurred on the 20th of December, 1895.

The mother of the deceased after his death assigned the beneficiary certificate to his wife, the present plaintiff.

The case was tried at Hamilton on the 27th of April, 1897, and the evidence shewed that the deceased became suspended in August, 1894, for non-payment of an assessment, and that he was reinstated in the following month. He again made default by non-payment of the assessment for September, 1895, and at the time of his death he stood suspended by reason of the non-payment of that assessment never having been reinstated or restored to membership as required by the rules of the order. He appeared on the defendants' books (report for September, 1895,) as a suspended member.

It was also proved that on the 21st of December some one on behalf of the beneficiary paid the defendants all the assessments for September, October, November and December, as well as the half-yearly dues payable at the end of

Statement. December. The death of Long, who died at the Cook County Hospital in Chicago, U.S., was not then nor for some time afterwards known to defendants, but as soon as they were informed of it, they returned \$7.50, the amount they then supposed from their books that they had received, to the sender. They had in fact received one dollar more but it was explained that there had been some clerical error in the entry which misled them. The return was accompanied by a notice that a member could not be reinstated after his death according to the defendants' laws as they understood them.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 2nd of February, 1898.

Aylesworth, Q.C., and *Totten*, Q.C., for the appellants. The wording of the rules is the same as that considered in *Wells v. Independent Order of Foresters* (1889), 17 O. R. 317, and the effect is referred to in *Dale v. Weston Lodge* (1897), 24 A. R. 351. If the rules apply the plaintiff must fail. But it is contended that section 33 of 55 Vict. ch. 39 (O.), has not been complied with. When, however, the certificate in question was issued this regulation did not apply to the defendants, and it would be unreasonable to hold that mere reinstatement should necessitate the issue of an entirely new certificate. It is not a new membership, but merely a doing away with a previously existing suspension, and the rules provide that in such a case the original beneficiary certificate shall revive. Even if the section applies at all it does not govern a point of this kind. This is not a condition impairing or modifying the contract. Payment of the dues is the consideration for the contract, the very essence of it: *Bacon on Benefit Societies*, 2nd ed., secs. 384, 385, and need not be set out. The section refers to collateral matters such as the observance of the formalities and domestic regulations of the order. If the plaintiff's contention is right payment of dues could not be enforced.

G. Lynch-Staunton, for the respondent. An insurance Argument.
contract is just the same as any other contract. It is, for instance, like a lease for a term at a monthly rental without a proviso for re-entry or forfeiture. In that case for non-payment the only remedy would be distress or action for the rent. The tenant could not be ejected. The section relied on is not limited to some condition modifying a previously existing contract. The intention is that there may be conditions contemporaneously made. These rules certainly impose conditions affecting the contract. The rules are changed from year to year, and it is most unreasonable to expect a man to be bound by such complicated regulations. The plain intention of the Act is that each member of the society shall have before him a clear, definite statement of what he is to be bound by. This is a renewal within the meaning of the Act. The rules shew the steps that must be taken. The man who gets rid of the forfeiture comes back with his original status and is effecting a renewal of his original rights. What is a renewal is considered in *London West v. London Guarantee Co.* (1895), 26 O. R. 520. The statute applies and has not been complied with and the plaintiff is entitled to succeed: *Morgan v. Hunt* (1895), 26 O. R. 569.

Aylesworth, Q.C., in reply.

March 15th, 1898. BURTON, C. J. O.:—

The sole question in this case is, I think, the construction to be given to the word "renewed" in sec. 33 of 55 Vict. ch. 39 (O.), the Insurance Act of 1892.

I think that confusion sometimes arises from disregarding the distinction between contracts of indemnity, as in insurance against fire, or guarantees for the fidelity of an individual, where the contract is usually for a certain fixed period and terminable then if not renewed. At the expiration of the named period the obligation of the insurer was ended, and it was only by the concurrence of the will of both parties that the obligation could be continued. It

Judgment.

BURTON,
C.J.O.

may be asked for by the one and may be assumed or refused by the other. It must be manifest in such a case that when a right is reserved to a party to renew or dissolve an obligation the determination of such party to renew an expired contract if accepted by the other makes an original contract.

A contract of life assurance is very different, it is in no sense a contract of indemnity, but is a contract to pay a sum of money upon the happening of a particular event, contingent upon the duration of human life, in consideration of the payment of a smaller sum at once or by certain periodical instalments which the assurer is bound to receive by the original terms of the contract. These payments and the acceptance of them by the assurer do not therefore constitute a new or renewed contract; it is the same contract as originally made, liable only to be defeated by reason of default in the payment of the premium.

To apply this reasoning to the present case:—By one of the rules of the society, notwithstanding default, the assured has the absolute right to reinstate himself by payment of the arrears within three months. He did make default in payment of an assessment in August, 1894, but in the following month was reinstated as of right by payment of the sum due. He became thereby a member in good standing under the original contract, in my opinion, and not under a new or renewed contract. But he subsequently again made default, which default continued up to the time of his death.

I regret, therefore, to be compelled to come to the conclusion that the appeal must be allowed.

OSLER, J. A. :—

Upon the evidence it appears to me that by the express terms of the contract between the deceased and the defendants, reading therein the application and the rules, the unfortunate plaintiff is out of Court. By the mere non-payment of the September assessment and without further

notice or action on the part of the defendants the deceased stood suspended from all the rights, benefits and privileges of the order: *Wells v. Independent Order of Foresters* (1889), 17 O. R. 317, and he and his beneficiaries lost all right to any portion of the beneficiary fund in the event of his death during suspension. By the terms of his application, which is made a part of the beneficiary certificate, he agreed that compliance on his part with all the laws, regulations and requirements of the order was the express condition on which he was entitled to participate in the beneficiary fund and to enjoy the other benefits and privileges of the order. One law of the order which he has not complied with is that which requires the payment of the monthly assessments, and by the certificate itself the defendants stipulate that any violation of the conditions set forth in the application terminates the membership of the party and that the Grand Lodge shall not then be liable for the sum insured.

The plaintiff relies upon sec. 33, sub-sec. 1, of the Insurance Corporations Act, 1892, 55 Vict. ch. 39 (O.), passed April 14th, 1892, after the issue of the certificate, which enacts that where any insurance contract made by any insurance corporation whatever within the intent of section 2 of the Act is evidenced by a sealed or written instrument all the terms and conditions of the contract shall be set out by the corporation in full on the face or back of the instrument forming or evidencing the contract; and unless so set out, no term of, or condition, stipulation, warranty or proviso modifying or impairing the effect of any such contract made or renewed after the commencement of the Act shall be good or valid, or admissible in evidence to the prejudice of the assured or beneficiary. Provided that a registered friendly society may, instead of setting out the complete contract in the certificate or other instrument of contract, indicate therein by particular references those articles or provisions of the constitution, by-laws, or rules, which contain all the

Judgment.

OSLER,
J.A.

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J.A.

material terms of the contract not in the contract itself set out; and the society shall at or prior to the delivery over of such instrument of contract deliver also to the assured a copy of the constitution, etc., therein referred to.

The defendants are a registered friendly society within the Act, which, as regards the contracts to be thereafter made by such societies, would seem to have come into force on the 1st of January, 1893.

The contention of the plaintiff is that although the beneficiary certificate was made before the Act, yet that, by reason of the reinstatement of the deceased in September, 1894, after his suspension for default in payment of the August assessment of that year, it became a contract renewed after the commencement of the Act, and that as the conditions or terms relied on as modifying or impairing the effect of the contract as it appears on the face of the certificate are not set out therein in full or indicated by particular reference to the articles of the constitution and the by-laws which contain them, they are not valid as against the plaintiff.

The question, therefore, is what is meant by the term "renewed" in this section? We must first notice the provision made by the rules for reinstatement of the suspended member.

Rule 32 confers upon him the absolute right to reinstate himself, if living, within three months from the date of the suspension upon the single condition of paying all the assessments and dues up to date. The same rule declares that his death during that period while in a state of suspension debars him from being restored to good standing and that payment or tender thereafter by his representatives shall be of no avail.

Rule 33 deals with reinstatement after three months and within six months from the date of suspension, which can only be procured upon the suspended member's application therefor, a medical examination and recommendation by the medical examiner of the lodge, approved by the grand medical examiner, the consent of his lodge, and payment of all assessments and dues.

If not reinstated within six months the beneficiary certificate is annulled, rule 34, and reinstatement can be obtained only by going through the same proceedings as upon initiation and admission to membership, and upon other special conditions, rule 35. It is, however, provided by that rule that a new beneficiary certificate shall not be issued in such cases, but that reinstatement shall revive the beneficiary certificate originally issued to the member.

Judgment.

OSLER,
J.A.

In the Courts of England and of this country and in some of those of the United States a contract of life insurance, such as we have in this case, is regarded as a single or entire contract for life, liable to be defeated or discontinued if the premiums are not paid. In *Dalby v. India and London Life Assurance Co.* (1854), 15 C. B. 365, at p. 387, it is said: "The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and, when once fixed, it is constant and invariable."

"A policy of insurance is not exactly a new contract every year, but is a contract made once for all with a condition to be performed *de anno in annum*, and if the condition is not performed in any year the contract is at an end," *per* Lord Hatherley, L.C., *In re Anchor Assurance Co.* (1870), L.R. 5 Ch. at p. 638. "A single contract, liable to be forfeited for a failure to pay any one premium:—its payment is precedent to the contract's continuance, but is subsequent in the sense that (it) is not paid on a new contract": Biddle on Insurance (1893), vol. 2, p. 184, vol. 1, p. 327.

It is of course quite immaterial how the premium is made payable, whether yearly, half-yearly, or quarterly, or even as in this case, monthly.

The term "renewed" or "renewal" has a well understood meaning with reference to fire insurance policies.

Judgment.

OSLER,
J.A.

These are contracts of indemnity against loss for a definite period which are extended or renewed for a further period upon payment of another premium: see the Ontario Insurance Act, R. S. O. (1887) ch. 167, sec. 114, which contains the statutory conditions deemed to be part of every contract of fire insurance entered into or renewed.

And so also in the case of a guarantee or insurance against dishonesty: *London West v. London Guarantee Co.* (1895), 26 O. R. 520. In all such cases the renewal is a new contract upon a new consideration which was entirely optional between the parties, continuing the former on foot for a further period on the terms therein contained, or as modified by the renewal contract: *Brady v. North-Western Ins. Co.* (1863), 11 Mich. 425; *Martin v. Home Ins. Co.* (1870), 20 C. P. 447; May on Insurance, 2nd ed., sec. 70a. Such a transaction differs essentially from that of keeping up a policy of life insurance by payment of the yearly or other premiums, the right to do which is conferred upon the assured by the contract itself and is quite independent of the further assent of the insurers.

I think that the term "renewed" in this section points to some new agreement between the parties, made at a time when the society is able to impose terms or to treat the beneficiary certificate as at an end. I do not think a contract can properly be said to be "renewed" if it is merely kept up by making the monthly payments in accordance with its terms, that is to say, in any way in which by the rules of the society the member or suspended member may pay them without the assent of the society and so keep himself in good standing, or if suspended, reinstate himself as of right. I see no difference between the effect of payment at the day under rule 15, and payment after the day and reinstatement as of right under rule 32. If one is a renewal of the policy so is the other, but I think it of neither. The language of the section seems to limit its application to the case in which some new instrument of contract is or may be issued by the society in which the impairing conditions may be set out in full

or by reference. There is no method provided by which certificates in existence before the Act came into force can be called in. We cannot suppose that the Legislature meant that they should be exchanged for new contracts or should become contracts without conditions under sub-sections (1) and (2) of section 33, as soon as the first assessment was paid after the Act came into force.

Judgment.

OSLER,
J.A.

I note the case of *Carter v. Brooklyn Life Ins. Co.* (1888), 110 N. Y. 15. By an Act of the Legislature passed in 1876, it was provided that no life insurance company doing business in the state should have power to declare forfeited or lapsed any policy thereafter issued or renewed, by reason of non-payment of premium, unless a notice containing certain particulars specified should have been sent to the insured not less than thirty nor more than sixty days before such payment became due. A policy had been issued in 1890 on which the plaintiff had paid several premiums after the passage of the Act. He failed to pay in 1893 and the company declared his policy forfeited. The action was brought to compel them to accept payment of the premium on the ground that they had failed to send him notice as required by the Act. The Court held that the Act applied to the policy on the ground that the payment and receipt by the company of each annual premium constituted a renewal of the policy within the meaning of the term "renewed" as used in the Act, and that the Act was not confined to a case where the policy had become forfeited or lapsed and had afterwards been restored or reinstated by the company.

This case is readily distinguished from the case before us. In the first place the Court appear to treat a life policy as a contract for a year with a perpetual right of renewal in payment of the yearly premium. Secondly, the act required to be done by the company was one which did not require the concurrence of the insured. They were simply to send him a notice, and the Court in effect hold that the intent of the Legislature was that this should be done in the case of all policies which continued

Judgment. in existence after the passing of the Act. "It would be,"
OSLER, said the Chief Justice, "at the option of the company to
J.A. re-execute a forfeited contract of insurance, and if the Act was held applicable to such a policy alone, it would confer no legal right whatever upon a policy-holder. It was the evident object of the Act to make it apply to some existing policies and confer some legal right upon their holders to avoid a cause of forfeiture; and if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should ever be any renewed policies thereafter or not."

We see from the terms of our Act that the Legislature did not intend to interfere with the liberty to contract further than to require that for the future the conditions should be set out in or indicated on the contract. Were we to construe the word "renewed" as equivalent to "existing" we should be imputing to the Legislature an intent to reduce all contracts which might remain in force after the passage of the Act to unconditional contracts by avoiding all conditions modifying or impairing their effect unless they happen to have been set out in, or indicated in, the contract. In other words, though no opportunity is afforded to the defendants of amending or correcting them, we should make the Act retrospective as regards such contracts.

I think we give full effect to the language of the Act by construing the word "renewed" as applicable to the case of lapsed or forfeited certificates which, perhaps by a new contract *inter partes* under rules 33-35 or otherwise, are reinstated.

For these reasons I am of opinion that there was no renewal of the contract between Long and these defendants after the commencement of the Insurance Companies Act, and that the appeal must be allowed.

MACLENNAN, and MOSS, JJ.A., concurred.

Appeal allowed.

R. S. C.

HILL V. BROADBENT.

Deed—Description—Appurtenances—R. S. O. (1877) ch. 102, sec. 4.

Where in a conveyance made in pursuance of the Short Forms of Conveyances Act, R. S. O. (1877) ch. 102, a parcel of land is accurately described by metes and bounds, the general words of sec. 4 will not pass lands with buildings thereon not embraced in the specific description, merely because the buildings were previously used, occupied and enjoyed with the property specifically described by metes and bounds. *Willis v. Watney* (1881), 51 L. J. Ch. 181, 30 W. R. 424, 45 L. T. N. S. 739, distinguished.

Judgment of ARMOUR, C. J., affirmed.

THIS was an appeal by the defendants, and a cross-Statement. appeal by the plaintiffs, from the judgment at the trial.

The following statement of the facts is taken from the judgment of MOSS, J.A. :—

The plaintiffs in this action are devisees and executors under the will of one Sarah Servos, who died in June, 1893. The defendants are the lessee and owner respectively of a parcel of land in respect of a portion of which this action arises. Both parties derive title through one Frederick M. Willson, and the questions in dispute at the trial are now narrowed down to the rights of the parties in respect of a brick stable which was undoubtedly built by Mrs. Servos in the year 1885.

Prior to the 4th of February, 1884, F. M. Willson was the owner of a large block of land in the city of Hamilton composed of lots 91, 92 and 101 on the east side of James street and south of Hunter street in the late George Hamilton's survey of lots in the city of Hamilton.

Situate upon a portion of these lots was a number of dwelling houses and other buildings. Commencing at the south-east corner of Hunter and James streets and going south on James street there were buildings used as a factory bearing street numbers 61, 63, 65, 67, 69, 71 and 73, and south of these were three dwellings bearing street numbers 75, 77 and 79. On Hunter street and to the east of the rear or easterly end of the factory buildings there

Statement. was a stone bakery and east of it two frame tenements known respectively as numbers 4, 6 and 8 on the south side of Hunter street. Willson had granted all the premises to one McElroy by an indenture of mortgage which had become vested in Mrs. Servos and there was a large sum due under it.

On the 4th of February, 1884, Willson entered into an agreement in writing with Mrs. Servos for the sale to her of two parcels out of the lots 91, 92 and 101, for the sum of \$9,800. The parcels were described in the agreement as "three stone houses known as numbers 75, 77 and 79 on the east side of James street south, the stone bakery known as number 4 situate on the south side of Hunter street east and the two frame tenements known as numbers 6 and 8 situate on the south side of Hunter street east, all in the city of Hamilton aforesaid, together with the lands used and belonging to the same." The purchase money was to be deducted from the amount due under the mortgage, and for the balance (\$3,700), still remaining due to Mrs. Servos after a cash payment, she was to receive a first mortgage upon the factory property known as numbers 61, 63, 65, 67, 69, 71 and 73. In order that Mrs. Servos should get a first mortgage, the consent of the Canadian Bank of Commerce, which held a mortgage subsequent to that already held by Mrs. Servos, was to be obtained by Willson and Mrs. Servos was to receive a conveyance of the two parcels free from incumbrances.

The mortgage held by Mrs. Servos upon the larger parcel was to be discharged and certain provisions were made for the protection of tenants of portions of the two parcels purchased by her. The agreement was followed by the preparation of the necessary instruments. These were (1) a deed of conveyance to Mrs. Servos of the two parcels; (2) a mortgage to her of the factory property; (3) a discharge of her mortgage over the larger parcel; (4) a discharge of the mortgage held by the Bank of Commerce; (5) A new mortgage to the bank over the factory property and all not sold and conveyed to Mrs. Servos by

the deed (1). The conveyance and mortgage to Mrs. Statement.
Servos bear date the 4th of February, 1884, and are registered on the 22nd of February, 1884, as numbers 29819 and 29818 respectively. The mortgage to the Bank of Commerce bears date the 22nd of February, 1884, and is registered the same day as number 29820 or immediately after the conveyance to Mrs. Servos. From the description of the lands in the deed of conveyance to Mrs. Servos it would appear that a survey of the boundaries must have been made for the purpose of defining the boundaries. At this time there was to the south of, and apparently annexed to, the stone bakery a frame shed, while to the south of the two frame tenements were a frame shed and a small stable 18x12 feet described by one of the witnesses as "an old stable, a frame bricked in" and to the south of the stable a water-closet. The dividing line between city lots numbers 91 and 92 appears to have run along the north side of the last mentioned shed and stable and south of them was a portion of city lot number 92. One George Stevenson was lessee from Willson of the stone bakery and was using the sheds and stable. It was said that there was a formal lease but it was not produced and the description of the premises thereby demised is not shewn, but there was produced a lease from Mrs. Servos to Stevenson in continuation of his tenancy and inasmuch as the agreement for sale provided for the continuance of the arrangement between Willson and Stevenson it is not unfair to suppose that the two leases contained the same description.

The description by metes and bounds in the deed to Mrs. Servos did not include the old stable. Commencing on Hunter street at the centre of the west wall of the stone bakery, the boundary line proceeded easterly along the south side of Hunter street fifty-three feet to the easterly boundary of city lot number 91, then southerly along the boundary sixty-five feet, six inches. This brought the line to the north-east corner of the old stable, and practically to the dividing line between city lots 91 and 92. The line then

Statement. proceeded westerly parallel with Hunter street seventeen feet, which was nearly, if not quite, the entire length of the old stable. It then went southerly parallel with the easterly boundary ten feet, which brought it to the south line of the shed to the west of the old stable. It then proceeded westerly parallel with Hunter street thirty-six feet to a point opposite the centre of the west wall of the stone bakery, thence it went northerly parallel with James street seventy-five feet, six inches, to the place of beginning.

This description, therefore, embraced the sheds but excluded the stable and water-closet, which remained on the portion of city lot number 92 that was retained by Willson. The other parcel was also conveyed by a very precise description. The deed further contained a grant of the right of ingress and egress over an alleyway ten feet wide from James street along the southerly and westerly limits of the James street parcel to the Hunter street parcel with a sufficient space for the turning of vehicles.

It thus appears that only a small strip of lot 92, ten feet wide and thirty-six feet long, is embraced in the description of the Hunter street parcel, and on this strip are situate the shed south of the two frame tenements and a portion of the shed south of the stone bakery.

The mortgage given to Mrs. Servos described the lands therein comprised as "lots numbers 91, 92, and 101, in block between James, Hunter, Hughson and Augusta streets in the late George Hamilton's survey in the said city, excepting thereout those parts of the said lots conveyed by [Willson] to [Mrs. Servos] by deed dated February 4th, 1884, and to be duly registered."

The mortgage to the Bank of Commerce described the lands therein comprised as lots 91, 92 and 101 on the east side of James street, and then proceeded, "together with the buildings thereon erected and the boilers, engines, shaftings, machinery, and fixtures upon or appertaining to said lands and premises, but excepting such parts of said lots and the buildings thereon as have been sold and con-

veyed by [Willson] to Sarah Servos and which consists of a portion of said lots, having a frontage on James street of seventy-eight feet and ten inches, and another portion thereof having a frontage on Hunter street of fifty-three feet." There was here a grant of all the portions of the lands and all the buildings not conveyed to Mrs. Servos. Statement.

On the 17th of April, 1884, Mrs. Servos assigned her mortgage to Charles Magill, and it does not appear that it ever was reassigned to her. After the execution and registration of the deed and mortgages George Stevenson continued to hold as lessee of the stone bakery and to make use of the sheds and stable, and on the 17th of June, 1884, a new lease was entered into between him and Mrs. Servos. It was in pursuance of the Act respecting Short Forms, and by it Mrs. Servos demised to Stevenson "that certain building known as number four (4) on the south side of Hunter street, in the city of Hamilton, at present occupied by him as a bakery and grocery."

There was, therefore, no express demise in the instrument of the shed and stable to the south of the two frame tenements, and it could only be by the force of the provisions of the Act respecting Short Forms of Leases (if at all) that these were included in the demise.

In the year 1885 Mrs. Servos caused the old stable to be torn down and the brick stable now on the premises to be built on the same site. The only difference between them appears to be that the doors of the former faced to the west while the doors of the latter face to the south. The new stable continued to be occupied by Stevenson until June, 1890, when he died, and his son George Stevenson continued the occupation until April, 1893, using the stable as theretofore.

Meantime and on the 24th of September, 1887, Willson and the Bank of Commerce joined in a conveyance to Edward Mitchell of portions of city lots 91, 92 and 101, described by metes and bounds so as to embrace the land on which the new stable stands. This instrument was registered on the 30th of September, 1887. On the 31st

Statement. of October, 1891, Mitchell leased the same premises by the same description to the defendant Broadbent for three years, with a right to purchase during the term for the sum of \$6,500. Mrs. Servos died on the 18th of June, 1893, and the plaintiffs are her representatives.

But before her death, and at or about the time when in 1891 Broadbent took his lease from Mitchell, a question was raised between Broadbent and Mrs. Servos as to who was entitled to the stable. Broadbent claimed it was part of the property leased to him. Mrs. Servos or her advisers claimed that there was a mistake in the deed to her, but no proceedings were instituted.

On the 1st of September, 1893, an agreement was entered into between Broadbent and his co-defendant Townsend, whereby the latter became assignee of Broadbent's rights under his lease and the right of purchase thereunder, upon an agreement for the advance by Townsend of the purchase money, the premises to be conveyed to and be held by Townsend subject to a right of repurchase or redemption by Broadbent.

Pursuant to this agreement, Townsend, on the 19th of September, 1893, paid to the representatives of Mitchell, who had died, the sum of \$6,500, and received from them a conveyance of the same premises by the same description, which was registered on the 19th of September, 1893. Townsend then gave to Broadbent a lease dated September 1, 1893, of the same premises by the same description for a term of three years. Broadbent claimed that in the autumn, and presumably about the date of this lease, he went into possession of the stable and remained there for more than a year without disturbance or hindrance from the plaintiffs as representatives of the estate of Mrs. Servos or any one on their behalf.

There is no doubt that from the 1st of August, 1893, until the 26th of February, 1895, the stable was not actually occupied by the plaintiffs or any tenant of theirs. There was a conflict of testimony at the trial as to who was in possession during this period, and the learned Chief

Justice found in favour of Broadbent's possession. In February, 1895, one Levy went into possession as tenant of the plaintiffs, and remained there until March, 1896. Soon afterwards Broadbent again went into possession of the stable, and also commenced to put up a fence on the portion of city lot 92 to the south of the sheds and stables in such a way as to interfere with the right of turning vehicles secured to Mrs. Servos by the deed to her of the 4th February, 1884, and on the 16th of June, 1896, this action was commenced.

The plaintiffs made claim of title not only to the stable and the right of way and turning, but also to a strip of land forming part of city lot number 92 to the south of the sheds and stable. They sought an injunction restraining the defendants from obstructing the plaintiffs' access to the stable and the lands used therewith and the use of the alleyways leading thereto, and a declaration that they were entitled in fee to a parcel of land described in the eleventh paragraph of the statement of claim, and in the alternative to be allowed the value of their improvements and a reformation (if necessary) of the deed of the 4th of February, 1884. At the trial before Armour, C. J., they did not press the claim to the title of the strip of land other than the part covered by the stable, and the defendants conceded the plaintiffs' right to the space for turning as provided by the deed. Consequently the questions narrowed down to the plaintiffs' right to the stable, or failing that to an allowance for the improvements. In support of their claim of title to the stable, the plaintiffs placed their main reliance upon the Statute of Limitations. They did not enter into evidence bearing upon the exclusion of the land covered by the stable by the metes and bounds in the deed of the 4th of February, 1884, or endeavour to account for it.

The action was tried at Hamilton before ARMOUR, C. J., who held that the land in question belonged to the defendants, but he awarded the plaintiffs \$300 as the value of the improvements.

Statement.

The appeal and cross-appeal were argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 20th of January, 1898.

W. R. Riddell, for the appellants.

G. Lynch-Staunton, and *E. Lazier*, for the respondents.

March 15th, 1898. BURTON, C. J. O.:—

I fully agree in the judgment prepared by my brother MOSS and adhere to the view taken by this Court in 1875 as to the construction to be placed on the general words in the Short Form of Conveyances Act (*McNish v. Munro* (1875), 25 C. P. 290), and that it was never intended by the introducing of those words to make such a sweeping change in the law of conveyancing as to pass lands or buildings not embraced in the specific description merely because they had been held, used, occupied and enjoyed with the lands particularly described. It was intended to dispense with the use of language which had from long usage crept into all deeds, *ex abundanti cautelâ* in many cases, and in the majority of cases quite unnecessary, as a mere grant of the land pure and simple is sufficient to pass all that is legally appurtenant and also all such rights and easements as are necessary to the proper enjoyment thereof in the state in which the property was at the time at which it was granted, and it was only in exceptional cases, as, for example, in the case of easements that had become extinguished by unity of seizin or enjoyment, or in some other way; it was easier, therefore, for conveyancers to use these antiquated forms than to decide whether or not the words were necessary in the particular case.

I agree also that the plaintiffs failed to make out any title to the stable, but there is a good deal in the evidence to point to the conclusion that there must have been some mistake and that Mrs. Servos was under the *bonâ fide* belief that it was comprised within her deed when she

made the expenditure she did upon it and was so long allowed to remain in possession unchallenged.

I agree, therefore, that we ought not to allow either the appeal or the cross-appeal, and that both should be dismissed without costs.

Judgment.

BURTON,
C.J.O.

Moss, J. A. :—

The learned Chief Justice determined that the plaintiffs had not acquired title by possession and upon the evidence I think that finding should not be disturbed. The utmost the plaintiffs shew is an uninterrupted possession from February, 1884, to August, 1893. In August or September, 1893, Broadbent who then claimed through his leases and agreements with Mitchell and Townsend took possession, and, as the learned Chief Justice has found, retained it until February, 1895. At the time he took possession and while he was there Mitchell and Townsend had an estate in the land which as against Mrs. Servos or the plaintiffs as her representatives entitled Broadbent to take possession. There was, therefore, a rightful entry by the owner which put a stop to the running of the statute. So that upon the face of the title deeds the defendants' title to the land covered by the stable was shewn and the Chief Justice so declared, but he awarded the plaintiffs \$300 as the value of the improvement.

The defendants appealed to this Court against this allowance, and the plaintiffs, by way of cross-appeal, attacked the decision as to the title to the lands covered by the stable, and besides urging the Statute of Limitations argued that the land passed to Mrs. Servos under the deed of the 4th of February, 1884, by virtue of the provisions of the 4th section of R. S. O. (1877) ch. 102, the Act respecting Short Forms of Conveyances, the deed purporting to be in pursuance of that Act. Among the general words to be found in that section is the word "stables."

Judgment.

Moss,
J.A.

But, as has been pointed out in reference to clauses in deeds of conveyance using general words similar to those employed in this section, there is comprised therein a number of words which are inserted with perhaps too little regard to the actual requirements of each case and many of the words would usually have no effect, as they could purport only to convey such portions of the property or such rights as would pass under a mere grant of the land. And nearly all the decisions as to the effect of these general words, when found either in old conveyances or incorporated by reason of the Act, have been with reference to rights in the nature of easements. That land cannot be held as appurtenant to land has been decided over and over again, and the words "with the same demised, held, used, occupied and enjoyed" seem more applicable to rights or easements annexed to the lands conveyed than to lands not by description embraced within the conveyance, more especially where the conveyance contains a minute description by metes and bounds.

In *McNish v. Munro* (1875), 25 C. P. 290, Patterson, J.A., in delivering the judgment of this Court pointed out some of the difficulties and inconveniences consequent upon giving too wide application to the general words of the Act. And it appears to me that his remarks apply with special force to a case where, as here, the vendor is granting a parcel of land out of a larger parcel retaining not merely the piece in respect of which the claim to include is made, but other portions of the same lands to which the general words of the Act could not by any mode of construction be made applicable.

If at the date of the conveyance to Mrs. Servos, Willson was not possessed of or entitled to any other portion of lots 91 and 92 than the stone bakery, number 4, and the two frame tenements, numbers 6 and 8, on Hunter street, and the piece on which the stable stood, a strong argument in favour of its being included by construction might be presented, and it would no doubt be supported by the case of *Willis v. Watney* (1881), not reported in the authorized

reports, but to be found in 51 L. J. Ch. 181, 30 W. R. 424, and more fully in 45 L. T. N. S. 739. The decision seems to stand alone. It is not noted in Wolstenholme and Turner's or White's books on the Conveyancing Act of 1881, nor in the 15th edition of Prideaux, or in Shelford's Real Property Statutes, 9th ed. (1893). It is, however, referred to in Bythewood, 4th ed., vol. 5, p. 185, where a full discussion with reference to authorities is to be found, and in Hunter's Real Property Statutes of Ontario, at p. 47. The decision may be supported on two grounds: first, that as pointed out by Fry, J., the yard in question was delineated in the plan annexed to the deed; and, second, that the yard had been conveyed to the previous purchasers as part of the property called Cardigan House, and the plaintiffs' vendor was not possessed of any other land or property which would make the retention of the yard a probable thing. The surrounding circumstances coincided with the terms of the conveyance and were very strong to shew that neither the plaintiff nor his vendor had any intention that the latter having sold and conveyed the mansion should retain the yard.

Judgment.

Moss,
J.A.

In the present case, where there is an accurate description by metes and bounds excluding the land covered by the stable, I am not prepared to hold that that land must be brought into the conveyance by force of the general words of the Act. And if I am obliged to choose between the decision in *Willis v. Watney* and *McNish v. Munro*, I am prepared to adopt the latter.

In my opinion the plaintiffs' claim to the land covered by the stable fails.

As to the defendants' appeal. The plaintiffs' claim to an allowance for improvements rests upon mistake of title. No evidence was given at the trial as to the circumstances under which the metes and bounds stated in the deed of the 4th of February, 1884, were arrived at, and indeed nothing was shewn to support a judgment for reformation. Yet it is difficult to avoid the impression that a mistake did occur in the running of the lines and in stating the metes

Judgment.
Moss,
J.A.

and bounds. It is easy to see how by bringing the east line of the parcel to the south-east corner of the old stable instead of to the north-east corner, and then going seventeen feet west and then ten feet north instead of ten feet south as in the deed, the stable would have been included. Then there is the fact, otherwise unaccounted for, that not very many months after the deed to her, Mrs. Servos expended nearly \$500 in erecting a new stable on the site of the old one, and that her tenants occupied the old and the new for at least six or seven years without question.

It is now too late to reform the instrument, especially as neither the Bank of Commerce, through which Townsend claims title, nor Townsend himself, was shewn to have had notice of any mistake. Besides, Mrs. Servos' title to the stable was questioned in her lifetime, but she then took no steps to have the mistake, if there was one, rectified. It may be that she or her advisers thought that in course of time the Statute of Limitations would repair the mistake.

But while these circumstances do not now afford ground for reformation, they support the contention that the stable was built under a mistake of title, and are sufficient to sustain the Chief Justice's award.

It was said that the Chief Justice's own opinion was opposed to the plaintiffs' right to the allowance, and some observations, which seem to have been made after he had awarded the allowance, are pointed out as appearing in the stenographer's notes. But these remarks, if made as stated, should not be taken as a retraction of his previously announced opinion.

I think the appeal and cross-appeal should be dismissed without costs to either party.

OSLER, and MACLENNAN, JJ. A., concurred.

Appeal and cross-appeal dismissed.

R. S. C.

SMITH V. ONDERDONK.

Negligence—Hire of Chattels—Contract—Sub-Contract—Defect—Damages.

A contractor who, pursuant to the terms of a sub-contract, supplies to a sub-contractor a machine for use in the work, is not liable in damages to one of the sub-contractor's workmen for injuries sustained by reason of a patent defect in the machine, which has been accepted and used by the sub-contractor without objection.

Judgment of FALCONBRIDGE, J., reversed.

THIS was an appeal by the defendant from the judgment of FALCONBRIDGE, J., and a jury. Statement.

The following statement of the facts is taken from the judgment of OSLER, J. A. :—

On the 12th of June, 1895, the defendant contracted with the Dominion Construction Company to construct, build and complete the Hunter street tunnel and approaches in the city of Hamilton, of the Toronto, Hamilton and Buffalo Railway Company. For the purposes of this case the terms of that contract are unimportant.

On the 15th of July, of the same year, the defendant entered into a sub-contract with the firm of Clifford & Sons for the performance by them of a certain portion of the work, namely, the excavation and grading by use of a steam shovel of the work within the limits of the tunnel and the western approach thereto between Locke and Queen streets.

By the 4th clause of the agreement the defendant agreed to furnish Clifford & Sons with a plough and cable and cars and locomotives at his, the defendant's expense, the locomotive and car service to be of sufficient capacity for the excavation work to be performed by them. By the 7th and 8th clauses it was agreed that Clifford & Sons were, subject to certain exceptions, to pay all men employed in connection with the shovel and in the work of excavating and dumping, and they were also to pay for all fuel, oil, waste and all repairs on all the plant used by them in excavating and dumping the material.

Statement.

Clifford & Sons entered upon the performance of the work under their contract, and on the 16th of October, 1895, engine No. 181 was delivered by Onderdonk to them or taken over by them from him as one of the engines which he had contracted to furnish them with for the purpose of their work. From that time it was under the dominion and control of Clifford & Sons, and the plaintiff, a workman in their employment, was working for them as a brakeman on such engine when he met with the accident complained of.

It was not denied that the engine was of sufficient capacity to do the work it was being used for, but when Clifford & Sons received it, it was said to be in a defective condition as regards the safety of a brakeman who might be engaged in coupling cars thereto by reason of the absence of a handrail at the back of the tender which the brakeman might catch and support himself by in case of a jerk or jar caused by the collision of the engine with the car.

On the 16th of October, 1895, the plaintiff, while attempting to couple the engine in question to a train of cars, slipped and had one arm crushed.

The action was brought under the Workmen's Compensation for Injuries Act, and came on for trial at Hamilton in January, 1897, and was then held not to be maintainable, the plaintiff not having been employed by the defendant. Leave to amend was given, and by amendment the claim now in question was raised, and the action was tried at Hamilton on the 20th of April, 1897.

The jury found a general verdict for the plaintiff, and assessed the damages at \$1,200, for which sum, with costs, judgment was directed to be entered.

The defendant appealed, and the appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 25th and 26th of January, 1898.

Crerar, Q. C., and *D. W. Saunders*, for the appellant.

Wallace Nesbitt, for the respondent.

March 15th, 1898. BURTON, C. J. O. :—

Judgment.

BURTON,
C. J. O.

A very large portion of the argument of the defendant's counsel pointed to what was alleged to be the fact, that the engine in question, 181, was not delivered to Clifford & Sons under the contract at all ; that the engines so delivered were numbered 191 and 193, and that 181 was delivered to O'Connor and used by him, and after his contract was completed Clifford & Sons being much better pleased with it than with one of those they were using applied to and obtained it from him without any communication with the defendant at all. It is scarcely necessary to say that if this had been the case there could be no liability of the defendant in this action, but no such answer to the claim seems to have been set up at the trial, or even in the reasons of appeal, and we must assume, therefore, that it was delivered by the defendant and accepted by Clifford & Sons as a locomotive delivered to them under the contract.

What then is the liability of the defendant under such circumstances ? He was liable to Clifford & Sons if the locomotive was not of sufficient capacity for the excavation work to be performed, and perhaps, notwithstanding the express language of the covenant, if it was not fit for the purpose for which it was to be used, but no complaint is made on this score ; the locomotive was admittedly suitable to do the work required of it, and Clifford & Sons were the only persons entitled to complain if it was not ; but although apparently fit for the purpose is the defendant liable to third persons for any defect in it rendering it unsafe to any person using it as, for instance, the absence of a hand-rail which might have prevented the accident ?

I think the plaintiff has correctly stated the law when he assumes that in order to fix the defendant with liability it was necessary to allege and prove that the defendant had knowledge that the locomotive had some defect rendering it dangerous to persons using it, and by defect I mean latent defect, for he could scarcely be liable to stran-

Judgment.

BURTON,
C.J.O.

gers for some defect which was visible to the bailee, and who, nevertheless, was willing to receive it in that condition.

I think the principle on which the defendant could be made liable to other persons than his bailee is this, that he must have been guilty of some misrepresentation or wilful suppression, in which case he may be liable for all the consequences proximate or remote, because the act is quasi criminal in its character, and the law presumes that all the consequences were foreseen and intended.

Mr. Smith, in his work on Negligence, says: "The true question always is, has the defendant committed a breach of duty apart from the contract? If he has only committed a breach of contract he is liable to those only with whom he has contracted, but if he has committed a breach of duty he is not protected by setting up a contract in respect of the same matter with another person."

The difficulty is in applying the law, and to fix upon the dividing line between those cases where the duty begins and ends with the contract, and where the law imposes a duty to third persons, notwithstanding the contract.

In *Losee v. Clute* (1873), 51 N. Y. 494, it was held that the vendor and manufacturer of a steam boiler was liable only to the vendee for defective material and want of care in its construction, and was not liable to a third person for damages caused by an explosion on account of such defect.

The well-known case of *Langridge v. Levy* (1837), 2 M. & W. 519, arose out of the sale of a gun with an assertion that it was the work of a well-known maker and safe to use; that, as between the parties, was a warranty, and the purchaser had a complete remedy in contract if the assertion was untrue; but he had a remedy also in tort if the representation was fraudulently made, and as in that case the seller was aware that it was required for the use of the purchaser's son, he was held liable to the son on the ground of deceit or fraud.

Here there is no pretence for charging the defendant

with any misrepresentation or fraud, and the action for any breach of warranty must be confined, in my opinion, to the immediate parties to the contract. The liability of the defendant cannot be placed on a higher footing than that of a manufacturer, and to hold manufacturers liable to third persons for the sale of an article not necessarily dangerous would impose a liability upon them which I think is not warranted in law.

Judgment.

BURTON,
C.J.O.

The plaintiff in the present case was a servant not of the defendant but of Clifford & Sons, and was acting under their orders in the proceeding which led to the unfortunate accident. So far as the present defendant was concerned he was a stranger to him in every sense of the term, unless a duty towards him arose by reason of some fraud or misrepresentation in the contract made with Clifford & Sons which led to the injury. Apart from that I do not understand how the plaintiff could take advantage of a contract with Clifford & Sons.

Had the defendant, knowing of a defect in this locomotive, and knowing that for that reason it was dangerous, and knowing, as he did know, that it was to be used by Clifford & Sons' workmen, allowed it to go into Clifford & Sons' possession without informing them of the defect, then, for any injury arising from that defect, I think he would have been liable even to third persons not themselves in fault.

There is no such evidence in this case, and I think the appeal should be allowed and the action dismissed.

OSLER, J. A.:—

It must be taken to have been found by the jury that the absence of the hand-rail was a defect in the condition of the engine, and that the accident which the unfortunate plaintiff sustained was the consequence of this defect.

The question is whether Onderdonk, who supplied the defective engine to Clifford & Sons, is liable to their servant, the plaintiff, for the injury thus sustained by him.

Judgment.

OSLER,
J.A.

From the peculiar circumstances under which the engine came into the possession of Clifford & Sons it cannot be inferred that Onderdonk or any one for whose acts he would be responsible then knew that it was in the defective condition complained of, if, having regard to the nature of the defect, that was material.

It is clear that inasmuch as there was no privity of contract between the defendant and the servants of his sub-contractors the plaintiff can only recover against him on proof of the existence of some duty on his part towards them. It is contended that inasmuch as the defendant knew, or must be taken to have known, that the engine to be supplied by him would be used and managed in the way in which such an engine is ordinarily used, there was a duty on his part to see that it was delivered in such a condition as not to be dangerous to persons using it, whether such persons were his sub-contractors or their servants. That is an extremely wide proposition, which, if true, would open the door to a large and extended liability on the part of manufacturers, vendors, and hirers of chattels and machinery of all kinds. It can, however, be said to be true only to a very limited extent, and the present case is not to my mind within any class of cases in which a person in the situation of the defendant has been held liable. The engine was not a thing of an inherently noxious or dangerous nature known to the defendant, but concealed by him from Clifford & Sons, which might cause an accident from the mere handling of it. Nor was the defect a latent defect known to the defendant, but concealed by him from the persons to whom he was supplying the engine. On the contrary it was a defect quite obvious to the eye, and Clifford & Sons chose to take the engine over in its defective condition and use it in the course of their business. Why, under such circumstances, should they not have done so, if they pleased, assuming, so far as their workmen were concerned, the risk of liability for accidents which might be suffered by the latter? The

breach of duty to which the accident is attributable is that of Clifford & Sons, who permitted the plaintiff to work upon the defective engine. Nothing that the defendant did or omitted to do conduced to their breach of duty in that respect as, *e.g.*, the warranty of the defective chain in *Mowbray v. Merryweather*, [1895] 2 Q. B. 640, where the defect was one not obvious to the eye, and the defendants having a warranty were not bound to examine it. Therefore, assuming that the defendant was negligent in supplying an engine defectively fitted, the accident was nevertheless the direct result of the neglect of Clifford & Sons, and not of any neglect of Onderdonk : *O'Neil v. Everest* (1891), 61 L. J. Q. B. 453. The defendant cannot be in a worse position than the builder of a ship or the maker of a carriage, as to whom it is laid down that when he "has delivered it out of his own possession and control to a purchaser, he is under no duty to persons using it as to its safe condition, unless the thing was in itself of a noxious or dangerous kind, or (it seems) unless he had actual knowledge of its being in such a state as would amount to a concealed danger to persons using it in an ordinary manner and with ordinary care": Pollock on Torts, 4th ed., p. 466, citing *Winterbottom v. Wright* (1842), 10 M. & W. 109; *Collis v. Selden* (1868), L. R. 3 C. P. 495; *Losee v. Clute* (1873), 51 N. Y. 494.

The plaintiff relied upon the general proposition as to negligence stated in the judgment of the Master of the Rolls in *Heaven v. Pender* (1893), 11 Q. B. D. 503, but it is manifest from later decisions in which that case has been authoritatively explained or distinguished that it cannot extend to impose liability upon a defendant in such a case as that before us : *Le Lievre v. Gould*, [1893] 1 Q. B. 491; *Caledonian R. W. Co. v. Mulholland*, [1898] A. C. 216; *Cunnington v. Great Northern R. W. Co.* (1883), 49 L. T. N. S. 392. It is supported simply as a case of invitation by the defendants to come upon their premises without having used reasonable care to be sure that their condition did not subject the person invited to danger. *Elliott v. Hall*

Judgment.

 OSLER,
J.A.

Judgment.

OSLER,
J.A.

(1885), 15 Q. B. D. 315, another case cited for the plaintiff, has no application. There the truck, the defective condition of which caused the accident, was in the control and management of the defendants, and it was held that there was a duty to those persons who, as they must have known, would come upon it to unload the coal they were forwarding by it, that it should not be in a dangerous and defective condition. *Caledonian R. W. Co. v. Mulholland*, [1898] A. C. 216, the report of which has reached us since the argument of the appeal, comes very near to the present case in its circumstances, and it is, in my opinion, a decision wholly opposed to the right of the plaintiff to recover. I refer particularly to the observations of Lord Shand, at pp. 231, 232.

MACLENNAN, and MOSS, JJ. A., concurred.

Appeal allowed.

R. S. C.

SEYFANG V. MANN.

Contract—Partnership—Chose in Action—Assignment of—Counterclaim—Novation.

A firm which had contracted with respondents to supply them with a number of bicycles, was subsequently dissolved, one partner retiring, and a new partner taking his place. The notice of dissolution stated that the business would be carried on by the new firm, who would pay the indebtedness of the old, and who were alone authorized to collect its debts, and by the agreement for dissolution, the partners released each other from all liability, and it was agreed that all the claims of the old firm belonged to and would be collected by the new. The respondents had a large claim for damages against the old firm for non-fulfilment of contract, and upon learning from appellants the facts as to the dissolution, made claim against the new firm :—

Held, upon the correspondence set out in the judgment of ROSE, J., that novation had taken place and that the respondents were entitled to claim against the appellants the damages which the former had sustained through breach of the contracts, but that such damages must be limited to those arising from breaches occurring prior to the dissolution. Judgment of ARMOUR, C. J., 27 O. R. 631, varied.

THIS was an appeal by the plaintiffs from the judgment of ARMOUR, C. J., in an action tried before him without a jury at the Spring Sittings at London, 1896. Statement.

The appellants claimed as assignees of a firm of Gibson & Prentiss by virtue of an agreement made between the latter whereby that firm was dissolved, one of the partners retiring and the other entering the appellants' firm. By the notice of dissolution the new firm assumed the indebtedness of the old, and by agreement each of the partners released the other from all liability connected with the firm, it being understood that all claims, book accounts, etc., should belong to appellants' firm. The old firm had contracts with the respondents for supplying bicycles on which a balance was due them by respondents who had claimed damages for breach of these contracts in not being promptly supplied as called for by the contracts. The learned Chief Justice gave judgment in favour of the appellants for \$486.28 and interest, and for the respondents on their counterclaim for \$2,530.

The judgment is reported 27 O. R. 631, where and in the judgment of ROSE, J., the facts are more fully stated.

Statement. On March 3rd and 4th, 1897, before MEREDITH, C.J., ROSE, and MACMAHON, JJ., sitting as the second division of the Court of Appeal, the appeal was argued.

Aylesworth, Q.C., and *Cronyn*, for the appellants. The recovery by the respondents upon their counterclaim is for damages for breach of a contract made between the respondents and a firm of Gibson & Prentiss and not between them and these appellants, and these appellants as assignees of the chose in action cannot be made liable by counterclaim or set-off beyond the amount of the claim assigned to them: *Young v. Kitchen* (1878), 3 Ex. D. 127; *Exchange Bank v. Stinson* (1881), 32 C. P. 158. The firm of Gibson & Prentiss also were not liable on the contract because their promise was dependent upon the performance by the respondents of their undertaking. The contract was entered into upon the express understanding that within two days the respondents should pay the account then due by them. This in order of time was the first thing to be done: *Norrington v. Wright* (1885), 115 U. S. 188; *Bowes v. Shand* (1877), 2 App. Cas. 455 at p. 463. The refusal by respondents to pay the account due from them on 1st July was evidence of their intention not to comply with the agreement they had made. They referred to *Withers v. Reynolds* (1831), 2 B. & Ad. 882; *Hochster v. De La Tour* (1853), 2 E. & B. 678; *Freeth v. Burr* (1874), L. R. 9 C. P. 208; *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434 at p. 442; *Pellas & Co. v. Neptune Marine Ins. Co.* (1879), 4 C. P. D. 139; in appeal (1879), 5 C. P. D. 34.

H. D. Gamble, and *I. F. Hellmuth*, for the respondents.

I. F. Hellmuth, argued the question as to the breach of contract and damages. It was the appellants and not the respondents who were trying to break the contract. The appellants had undertaken more than they could perform; their factory could not turn out the wheels; but even if the contract on the part of the respondents was dependent upon the payment to be made within two days, they

substantially complied with this by paying \$800, out of \$869. [The Court stopped him intimating that the only difficulty they felt was as to the right of set-off on the part of the respondents.] Argument.

H. D. Gamble.—The respondents do not require to rely upon any right of set-off against the appellants as assignees of a chose in action although that position might perhaps be supported on the authority of *Exchange Bank v. Stinson* (1881), 32 C. P. 158, and *Government of Newfoundland v. Newfoundland R. W. Co.* (1888), 13 App. Cas. 199, but the respondents rely upon novation. The appellants in their pleadings claim as “the successors” of Gibson & Prentiss against whom the respondents were entitled to damages for breaches of the agreement of 18th June, 1895. The respondents notified the appellants of their claim for damages by letter 22nd July, 1895, in which they say “We have a large claim for damages on account of non-fulfilment of these contracts and we trust you have made this a consideration when you made the change in your firm.” Then in the notice of dissolution of partnership sent to the respondents 25th July, 1895, it is stated that all the indebtedness of the old firm of Gibson & Prentiss is to be paid by the appellants, and in the subsequent correspondence the appellants treat with the respondents upon the basis of the contract having been adopted by them. Upon much less evidence has novation been held to have taken place: *Parsons on Partnership*, 4th ed., secs. 240, 326, 337-8; *Hart v. Alexander* (1837), 2 M. & W. 464; *Ex p. Williams* (1817), Buck, 13, 15; *Re Commercial Corporation of India and the East* (1868), 16 W. R. 958; *Ex p. Jackson* (1790), 1 Ves. Jr. 131; *Kirwan v. Kirwan* (1834), 2 Cr. & M. 617; *Lyth v. Ault* (1852), 7 Ex. 669, 672; *Thompson v. Percival* (1834), 5 B. & Ad. 925; *Henderson v. Killey* (1889), 17 A. R. 456; *Osborne v. Henderson* (1889), 18 S. C. R. 698, and cases there cited.

Aylesworth, Q.C., in reply. This is the first time the point now relied on has been taken, and it is not in the reasons of appeal; it is a distinct departure. The appel-

Argument. lants sue as assignees of chose in action not as successors, and they were proved at trial to be assignees. There is no consideration for the novation, no discharge of Gibson and no evidence of acceptance of position by Mann.

February 14, 1898. ROSE, J.:—

Without entering into the difficult question of set-off and counterclaim, which has been much argued before us, I think judgment on the counterclaim may be supported on the ground taken by Mr. Gamble at the argument, namely, that novation has been shewn.

The contract was made between the firm of Gibson & Prentiss, trading under the firm name of Gibson & Prentiss Cycle Company, and the defendants. Such partnership was dissolved on the 22nd day of July, 1895, Gibson retiring, and the plaintiff Seyfang taking his place. The notice of dissolution is as follows: "To all whom it may concern: Take notice that the copartnership heretofore existing between the undersigned in the bicycle business, under the name of Gibson & Prentiss Cycle Company is this day dissolved by mutual consent. The business will be continued by George Seyfang and Andrew L. Prentiss, by whom all indebtedness of said firm is to be paid and who are alone authorized to sign the firm name in liquidation of debts due the said firm of Gibson & Prentiss Cycle Co."

The formal agreement was put in signed by Gibson & Prentiss, dated the 23rd July, which witnessed: "That the copartnership heretofore existing between the parties hereto under the firm name of Gibson & Prentiss Cycle Co., be and the same is this day dissolved and terminated by mutual consent, and each of the parties hereto releases and discharges the other of and from any and all liability and obligations growing out of or in any wise connected with the said firm's business heretofore carried on by them under such firm name. It being understood that all claims and demands, notes, bills and book accounts belonging to the said firm above mentioned belong to and will be

collected by George Seyfang and Andrew L. Prentiss who are the owners thereof." Judgment.

ROSE,
J.

These facts were evidently communicated to the defendants by a letter of the 19th July, for on the 22nd July, the defendants wrote to Seyfang & Prentiss as follows:

Dear Sirs :—

We have yours of the 19th and note contents. We have already made three contracts with your firm as it was before the change, and not one of them has been carried out in any way, where there was a chance to break the contract. We have a large claim for damages on account of non-fulfilment of these contracts, and we trust you made this a consideration when you made the change in your firm. It will be almost impossible for us to go over there now, but will be pleased to have you come over here, if you can. In the meantime it would be well to start shipping us some number 8's, as we have several of these sold, and the longer the delay in shipment is, the larger our claim will be. We are ready at any time to settle up our account, but we first must have a settlement of our claim for damages, also a different contract in regard to shipping wheels. In our second contract with you, there is one clause where we made certain arrangements for 1896 trade, and we pushed the sale of Bisons as if we intended handling them for 1896 and during years to come, and almost all the money we have spent advertising has been on the Bison wheels, as it is the only wheel we are handling this year that we fully intended to handle afterwards. Please say if it is your intention to retain the name of "Bison" for your wheels and the present business stand that you have, and if possible give us an idea of what your 1896 wheel will be like. In regard to the parts you have over there for repairs, kindly let us have these at once. There are three or four parties waiting for these before they can use their wheels. Also send us a couple of sprockets with eighteen teeth and a couple with nineteen teeth. We promised these to several parties who are riding, and they are continually asking us for the higher gears."

Judgment.

ROSE,
J.

On the 23rd the plaintiffs answer, disputing the claim for damages, not on the ground that they had not undertaken to pay whatever Gibson & Prentiss would be liable for, but on the ground that the agreement of June 18th "cancelled" the claim. What is now to be considered is the claim for breaches under the agreement of the 18th June.

We have here evidence of an agreement between Gibson & Prentiss and Seyfang & Prentiss, by which Seyfang & Prentiss were to pay all the indebtedness of the firm of Gibson & Prentiss, and were to collect in all the claims and demands, notes, bills and book-accounts belonging to Gibson & Prentiss, such claims, etc., having apparently been transferred to Seyfang & Prentiss, who were declared to be the owners thereof. In other words, we have a partner going out and a partner coming in; the new firm apparently taking the assets of the old firm, and agreeing to be liable for all debts.

This is stated in Parsons on Partnership, 4th ed., par. 337, to be a novation of the debts whereby the new partner becomes bound. The learned text writer adds, "But by the law of novation (which is perhaps the latest law borrowed from the civil law) the new debt is not obligatory, unless the old one is discharged; and the old one cannot be discharged without the consent and concurrence of the creditor."

In a foot note to that paragraph, I find it stated as follows: "If a creditor agreed (expressly or impliedly) to release from the debt the members of the old firm on consideration of the agreement by the new firm to pay, a novation would take place, and the new firm would of course be liable."

In *Ex p. Jackson* (1790), 1 Ves. Jr. 131, Lord Chancellor Thurlow said: "If oneman having debts, takes another into partnership with him, a very little matter respecting those debts will make both liable."

In Leake's Law of Contracts, 3rd ed., p. 685, it is said: "Questions of novation also arise upon changes occurring

in partnerships with reference to the consent of customers to accept the new firm as debtors instead of the old. A customer who continues to deal with the firm after notice of a change in the partners is presumed to accept the new firm as his debtors."

Judgment.

ROSE,
J.

Several cases are referred to, among others, *Hart v. Alexander* (1837), 2 M. & W. 484. There knowledge of a change in the partnership, one partner going out and another coming in, continuing to deposit moneys with the new firm, receiving accounts and payments of interest at varying rates from the new firm, giving a the power of attorney to the new firm in which the name of retiring partner did not appear, were considered evidence of knowledge of the fact of a change and of acceptance of the new partnership and of the discharge of the old.

Alderson, B., said at p. 494: "Now, some things are clear in the case: it is clear that the plaintiff left the firm at the period stated in the plea; and also that the plaintiff gave credit to the firm of Alexander & Co., no matter who were the persons who from time to time composed the firm: and I think there was evidence from which a jury might infer that he knew of changes in the firm from time to time: the material question however is, whether he knew of the defendant's having left it."

Bilborough v. Holmes (1876), 5 Ch. D. 255, may be referred to especially with regard to the case of Miss Amiel, on p. 262.

The law is much discussed in *Henderson v. Killey* (1889), 17 A. R., 456, where I think novation would have been found, at least by a majority of the Court, had not the plaintiff brought an action upon the note which she held against the endorser and shewn by the frame of her action then under consideration that she was treating the outgoing partner as continuing liable. The case of *Rolfe and the Bank of Australia v. Flower, Salting & Co.* (1865), L. R. 1 P. C. 27, is referred to by the learned Chief Justice of Ontario, at p. 463, and the facts sufficiently set out.

Judgment.

ROSE,
J.

On p. 467, the learned Chief Justice cites from Lord Eldon, in *Ex p. Williams* (1817), Buck 13, at p. 16, as follows: "Very little will do to make out an assent to the agreement" (*i.e.*, as to the assumption of former debts). Again, at p. 466, the language of Wood, L.J., in *Re The Commercial Bank Corporation of India and the East* (1868), 16 W. R. 958, at p. 960, as follows: "No doubt very slight knowledge and recognition by Captain Jones of these facts would have been sufficient to bind him."

Mr. Justice Osler, at p. 471, says: "If the plaintiff cannot recover on this ground, then, she is, I think, obliged to shew that there has been a novation of the debt in order to recover upon the footing of a new agreement between herself and the firm. That involves the extinguishment of the old contract and the creation of a new one, the former being usually the consideration of the latter. The cases no doubt lay it down that very slight circumstances will prove this, and it would be easy to infer from the mere fact that a demand had been made upon the new firm, and that they had paid something on account of the debt, that a novation had taken place and that the separate creditor had consented to accept the liability of the firm in discharge of the separate liability, and that all parties had agreed to treat the debt as a joint one. An express declaration of intention would not be essential."

This case went to the Supreme Court, and is found in 18 S. C. R. 698, *sub nomine Osborne v. Henderson*. The opinions of the learned Judges are not given, save as may be found in the note as follows: "Reversing the decision of the Court of Appeal (17 Ont. App. R. 456, *sub nomine Henderson v. Killey*) and of the Divisional Court (14 O. R. 137), Fournier, J., dissenting, that the agreement between the continuing partners and the defendant did not make the defendant a trustee of the former's property for the payment of his liabilities, and that the act of the defendant in paying some of the notes did not amount to novation as it was proved that the plaintiff had obtained

and still holds a judgment against the maker and endorser of the notes in an action thereon, and there was no consideration for such novation." It is manifest, therefore, that the decision in that case turns upon the particular facts and is not against the contention that there was a novation in this case.

Judgment.

ROSE,
J.

Given the fact of the assumption by the new firm of the debts of the old, and the knowledge of that fact by the defendants, I think the letter of the 22nd July from the defendants to the plaintiffs is very clear and potent evidence of an acceptance of the new firm and discharge of the old.

It will be remembered that the dealings between the plaintiffs and the defendants were to be on the footing of a contract or contracts made with the firm of Gibson & Prentiss, that the moneys payable and which were to go to the plaintiffs were moneys payable pursuant to the terms of such contract, and that the moneys claimed by the defendants from the plaintiffs were moneys which were alleged to be payable to them by reason of the breach of the agreement contained in such contract. In other words, in this action the plaintiffs are seeking from the defendants moneys payable by reason of the breach of the defendants' agreement to pay as provided for by the terms of the contract, and the defendants are seeking from the plaintiffs moneys payable to the defendants by reason of a breach of the agreement contained in the same contract.

It would be manifestly unjust to allow the plaintiffs to recover on that contract and refuse to the defendants the relief sought. It would, therefore, in such a case take even less than in some other cases to lead the mind to the conclusion that when the defendants agreed to the plaintiffs continuing to carry on business under the contract which had been made with Gibson & Prentiss, and pointed out to them that in continuing they were continuing subject to a claim for damages, calling their attention to the fact of a necessity for arranging with Gibson & Prentiss as to such damages, because such claim would be made, and

Judgment.

ROSE,
J.

pointing out further the necessity for more prompt delivery of goods under the contract, and that the damages which were then being sought would be increased by further delay, I cannot conceive any doubt as to the conclusion to be reached, namely, that the defendants were accepting the plaintiffs in lieu of the firm of Gibson & Prentiss and were continuing business relations with them on the footing of former contracts, were accepting them as their creditors in respect to moneys, if any, payable by the defendants under the contract and were accepting them as their debtors in respect to the damages which they claimed by reason of a breach of the same contract. If there was no acceptance of the plaintiffs as both creditors and debtors, I do not see why the defendants stated as follows: "We have a large claim for damages on account of non-fulfilment of these contracts, and we trust that you have made this a consideration when you made the change in your firm." Again, "In the meantime it will be well to start shipping us some number 8's as we have several of these sold; the longer the delay in shipment is, the larger our claim will be. We are ready at any time to settle up our account but first we must have a settlement of our claim for damages also a different contract in regard to shipping wheels." This seems to me to be a complete giving up of the firm of Gibson & Prentiss and an acceptance of the firm of Seyfang & Prentiss in their stead.

The pleadings in the case are consistent with this position and inconsistent with any other. The plaintiffs claim as successors of the Gibson & Prentiss Cycle Co. and claim upon the contract as if the contract had been made with them. It is true that the claim is for goods sold and delivered, yet the goods, as the evidence shews, were sold and delivered pursuant to the contract between the parties. The defendants do not say that the plaintiffs were not entitled to recover by reason of not being parties to the contract or as successors to Gibson & Prentiss, and admitting their status in that respect, claim damages from them for the non-fulfilment of the contract.

It will be observed in this case that there is no contest as to the question of the plaintiffs having assumed the liabilities of Gibson & Prentiss, or as to their liability to pay the same: the only question is, as I have endeavoured to shew, whether the defendants assented to the substitution of Seyfang as their debtor instead of Gibson. And this case is peculiar in that the contest is raised not by the creditors but by the debtors, *i.e.*, by the new firm. In many of the cases in which the question has arisen, it has been where the creditor has sought to charge the old firm and has been held to have elected to take the new firm as his debtor instead of the old firm. Here the creditors are asserting that they have taken the new firm, and point to their correspondence, conduct and pleading. If they should sue the old firm for this indebtedness, it might well be set up that they had previously sued the new firm and had so evidenced their election.

Judgment.

ROSE,
J.

But I do not think that the novation applies to more than the amount of liability of the old firm at the time of dissolution. Prior to that time the old firm had taken the position that on account of the default of the defendants in making their payments under the contract, they (Gibson & Prentiss) were not bound to deliver any more bicycles. The plaintiffs took the same position. It cannot be assumed, therefore, that as between the old and the new firm there was any contract expressed or implied to supply goods under the contract or to pay any liability not previously incurred. The claim of the defendants, therefore, I think, must be restricted to the damages arising from breaches prior to the dissolution. Such claim may be made up as follows:

[The learned Judge then considered the defendant's claim for damages.]

Judgment will, therefore, stand upon the claim as given. The judgment on the counterclaim will be reduced to \$650. And, as the success has been partial, I think there should be no costs of this motion.

The judgment will be without prejudice to the right of the defendants to seek from Gibson & Prentiss whatever

Judgment. damages, if any, they may be entitled to for breach of the
ROSE, contract of the 18th June occurring subsequently to the
J. dissolution.

MEREDITH, C.J. :—

Although I have hesitated by the way, I have finally come to the same conclusion as my learned brother on the question of novation. It will be observed that the result of the judgment is to reduce the amount allowed on the counterclaim from \$2,500 odd to \$650. That is the necessary result of my learned brother's judgment, inasmuch as the contract is not one upon which the plaintiffs sue as assignees of a chose in action but is a contract with them, and, therefore, there can be no right against them in respect of what the old firm owed by counterclaim or otherwise.

MACMAHON, J., concurred in the result.

G. F. H.

RICE V. TOWN OF WHITBY.

Municipal Corporations—Highways—Obstruction—Notice.

A house which was being moved from one part of a town to another was allowed to stand over night upon one of the streets without a watchman or warning light. The horses attached to a carriage in which the plaintiff was while being driven past the house that night took fright and the plaintiff was injured. Some of the town councillors knew that the house was being moved and two of them knew that it had been left standing upon the street for the night:—

Held, that, assuming that the house was an obstruction to the highway, there was not sufficient notice or sufficient lapse of time to impose liability upon the corporation.

Judgment of *BOYD, C.*, 28 O. R. 598, reversed.

Castor v. Uxbridge (1876), 39 U. C. R. 113; *Toms v. Whitby* (1875), 37 U. C. R. 100; and *Maxwell v. Clarke* (1879), 4 A. R. 460, referred to.

THIS was an appeal by the third party and the defendants from the judgment of *BOYD, C.*, in favour of the plaintiff, reported 28 O. R. 598. Statement.

The following statement of the facts is taken from the judgment of *OSLER, J.A.*

The action is for damages sustained by the plaintiff in consequence of an unguarded obstruction being allowed to remain on the highway. The defendants caused one Thomas Deverill to be added as third party under the provisions of the Municipal Act in order that they might obtain relief over against him in case they should be found liable to the plaintiff.

The facts relevant to the appeal are simple and may be concisely stated as follows :

On the 24th of May, 1897, one Heard, for the purpose of carrying out an agreement he had theretofore made with Deverill entered upon the business of removing a small building belonging to the latter, from one place to another, in the town of Whitby. This could only be done by taking it along a street or streets in the town. He began the job in the morning: it took longer than was expected and the result was that the house was left for the night on the highway, and partly on the travelled part of the road.

The plaintiff drove along that road in the evening about

Statement. 9.30 p.m., and his horses coming up close to the building suddenly swerved to one side in order to avoid a collision and the plaintiff was thrown out and injured. A very large number of witnesses were examined in whose testimony there is a most surprising discrepancy as to the actual position of the building on the road, the width of road capable of being driven upon between the side or corner of the building and the ditch, and the care or want of care with which the plaintiff was driving. These are matters which in view of the findings of the learned Chancellor thereon, with which I entirely agree, may now be left altogether out of consideration.

The evidence of notice to the defendants of the existence of the obstruction, though short, must be a little more fully referred to.

John Smith, the chairman of the street committee, had given permission to remove the sidewalk opposite Deverill's lot in order to get the building out upon the street.

Jerome Scott, the deputy reeve, and a town councillor, saw the men at work while moving the building along the street about 5.30 p.m. He saw it again about 8.30 p.m. where they had left it for the night, and again at 9.30 p.m., when he was standing near it, with others, when the accident happened.

W. J. Luke, another street commissioner, saw the men at work moving the building in the morning just after it had been brought out upon the road, and again as he was driving home in the evening before dark after the workmen had left it.

Noble, the third street commissioner, saw it probably more than once in the course of the day while the moving was going on and passed by it again between 4 and 5 p.m.

One Calverley, the chief constable of the town, was there at the same time. There was some discussion then as to where the work would be stopped for the night and Noble suggested that the College street corner or crossing

would be a better place than opposite to one Burns' house where Heard intended to stop, as the road was wider and there was more light there from the electric light. It does not appear that Noble saw the building again on that day. Statement.

By-laws of the corporation were proved, by one of which the witness Calverley was appointed chief constable. His duties *inter alia* were to take notice of all obstructions in the streets of the town and to remove them or take all proper measures in relation thereto according to law under the direction of the council.

He was to report to the chairman of the committee all defects in the streets, give notice to the officer of the town charged with the duty of attending to them and to see that all dangerous places in such streets, etc., were temporarily protected sufficiently to prevent accidents. By another by-law intituled to provide for the management of the moneys appropriated by the council to the committee on streets and improvements, etc., and reciting that it was expedient to provide for the manner in which the moneys granted by the corporation for repairs and improvements on certain specified streets should be expended, it was enacted that a committee composed of a member from each ward should be annually appointed by the council to be known as the standing committee on streets and improvements: that the committee should have the entire supervision and control of the streets, naming them (one of them being the street on which the accident occurred), and that the appropriation from the town funds made by the council for the repairs and improvements of said streets should be expended by the said committee for that purpose. The by-law provided also that no individual member of the committee should have authority to order work to be done without having the sanction of at least two members of such committee.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 28th of March, 1898.

Argument.

C. J. Holman, for the appellant, the third party. This was a reasonable and lawful user of the street and there is no right of action: *Toronto Street R. W. Co. v. Dollery* (1886), 12 A. R. 679. The work was being done by contract, and if there be a right of action at all it is a right of action against the contractor, and not against this appellant: *Hughes v. Percival* (1883), 8 App. Cas. 443. There was no duty to keep a warning light: *Ryan v. Curran* (1882), 64 Ind. 345; and even if there were, the contractor again is the person responsible: *Walker v. McMillan* (1882), 6 S. C. R. 241.

Aylesworth, Q.C., and *Farewell*, Q.C., for the appellants, the town of Whitby. If any one is liable the third party is, the work not having been done by a contractor, within the meaning of the cases, but with the third party's knowledge and under his control: *Ellis v. Sheffield Gas Co.* (1853), 23 L. J. Q. B. 42. But upon the facts of this case there is no right of recovery against the town. There was no obstruction or want of repair: *O'Neil v. Windham* (1897), 24 A. R. 341; *Howarth v. McGugan* (1893), 23 O. R. 396; *Maxwell v. Clarke* (1879), 4 A. R. 460; *Howden v. Lake Simcoe Ice Co.* (1894), 21 A. R. 414; and no notice to the corporation if there were: *Duck v. Toronto* (1884), 5 O. R. 295; *Burns v. Toronto* (1878), 42 U. C. R. 560; and the other cases just cited. There was contributory negligence here: *Flood v. London West* (1896), 23 A. R. 530.

W. R. Riddell, and *C. A. Jones*, for the respondent. The house was standing on the travelled part of the street and was thus a direct obstruction. This distinguishes the case from *O'Neil v. Windham* (1897), 24 A. R. 341, and *Maxwell v. Clarke* (1879), 4 A. R. 460. It is shewn that several councillors and the chief constable knew that the house had been left in the street without a watchman or a light, and they should have had proper safeguards provided: *Bloor v. Delafield* (1887), 69 Wis. 273.

C. J. Holman, in reply.

May 10th, 1898. BURTON, C. J. O.:—

Judgment.

BURTON,
C.J.O.

It would be a very large and liberal construction indeed of the words "keep in repair" which would properly fix the town of Whitby with liability for the injury the plaintiff sustained in returning home from Bowmanville on the evening of the 24th of May, 1897, under the circumstances detailed in evidence.

The case of *Castor v. Uxbridge* (1876), 39 U. C. R. 113, so frequently referred to in cases of this nature, is not authority for the law there laid down. The remarks of the late Chief Justice Harrison, although interesting, and evincing his usual industry in the collection of cases, are *obiter*, that case having been decided simply on the point that the plaintiff was guilty of contributory negligence, but I am of course free to admit that some of the views expressed by him in that case have, as I think unfortunately, been adopted in subsequent judgments; but if this judgment against the town of Whitby is to stand it will increase the responsibility of municipalities far beyond any previous decision.

That the highway itself was in a good state of repair is conceded, the liability of the town, if any exists, is for the negligent omission to do something in reference to an obstruction placed on the side of the road by a stranger without its authorization or direction.

The facts, although an immense amount of evidence was deemed necessary to establish them, appear to be briefly these: [The learned Chief Justice stated them and continued:]

The removal of a building along a highway, as decided by this Court in *Toronto Street R. W. Co. v. Dollery* (1886), 12 A. R. 679, is a legitimate user of the highway, not requiring, in the absence of a by-law, the assent or permission of the municipal authorities, and it is difficult, therefore, to appreciate the relevancy of the evidence, filling so much of the appeal book, as to the knowledge of various members of the council who saw the building in various parts of the street

Judgment. in the course of removal. The same remark applies to the
BURTON, constable, who was then on sick leave, and who saw it in
C.J.O. the course of the afternoon, and who seems to have been
under the impression that it would have arrived at its
destination before nightfall.

Assuming for a moment that the knowledge of individual members of the council could bring home notice to that body, which is absolutely necessary before they can be fixed with a legal liability, the only member of the council to whom any knowledge of anything illegal is proved was Scott, who first saw the building in daylight between five and six o'clock, and he saw it afterwards about eight, and afterwards about nine, shortly before the accident, when the electric lights were burning. I could understand that if a member knew of something dangerous left in the street which he should have mentioned to the council at its next meeting it might be a proper inference that he had done so, and would be *prima facie* evidence of notice to them, but here the whole thing occurred within an hour or two after it came to his notice.

Now what is the negligence imputable to the council? It cannot surely create a liability upon the ratepayers that a member of the council, who had no opportunity of consulting the council as a body, and who saw that the locality was sufficiently lighted up to enable any person driving along the road for a long distance to see the building, should have omitted to procure lanterns with a red and white light to put upon the building. I can quite understand that after the electric lights were extinguished that might be a very wise and reasonable precaution but whilst they were burning I should have regarded such an addition as almost ludicrous and only useful at any time to enable the travelling public to avoid coming in contact with the building and not to avoid frightening of horses; and if I may venture to hazard an opinion I think it quite probable that the dazzling brightness of the electric lights caused the horses to shy.

The learned Chancellor seems in the early part of his

judgment to have been of opinion that there was no liability. Mr. Farewell submitted that there was no liability on the town, to which the learned Judge replied: "That is my impression at present, that whatever liability there is rests on Deverill," but shortly afterwards he refers to it in this way: "The point is that a building was put there which is a very unusual thing to put on the road and it was allowed to be there on the assent of the corporation." Of this, I submit with great respect, there is no evidence; there was no evidence that any officer of the corporation with authority to act had any knowledge of its being left on the street and it is not sufficient that a member of the council saw it, even if there was anything to invite action in what Scott saw.

Judgment.

BURTON,
C.J.O.

If the electric lights had at that time been extinguished it would have been a proper thing to exhibit the usual warning lights, and he might well assume that the person moving the building would take that precaution, but there was no duty cast upon Scott to do so, much less upon the council, who, as the representatives of the ratepayers, had no notice.

The town being relieved and there being nothing to be indemnified against the action against the third party fails.

I offer no opinion as to whether the owner of the building or the person doing the work or both or either of them are liable to the plaintiff. As to the third party's costs it is impossible to lay down any general rule; the statute gives a wide discretion and the town must exercise its judgment upon the facts as to whether it is or is not desirable to bring in some one else either as a third party or as a defendant, and under the circumstances of this case we think it is perhaps fair to make no order as to those costs.

The appeal of the town should be allowed with costs.

OSLER, J. A. :—

I understand the law of this Court in relation to such a claim as forms the subject of this action to be in accordance with what is laid down in the head note to *Castor v.*

Judgment.

OSLER,
J.A.

Uxbridge (1876), 39 U. C. R. 113, viz., that municipal corporations are responsible for damages caused to travellers by obstructions placed upon the highway by wrongdoers of which the corporation have or ought to have knowledge, and that the road is out of repair when by the existence of such obstructions it is rendered unsafe or inconvenient for travel. It is of course implied in this statement that a reasonable time has elapsed after such notice to enable the corporation to remove such obstructions or take proper measures to guard against accidents arising therefrom. I am aware that it was not necessary for the decision of that case to lay down this proposition, but it was subsequently expressly approved by this Court in *Maxwell v. Clarke* (1879), 4 A. R. 460, where it is said that it "established no new principle. It merely applied the well established doctrine in a case where the safety of travellers on the highway was endangered by obstacles placed on the road by a stranger just as it might have been endangered by an excavation made in a highway by a stranger, the effect in either case being to put the road out of repair."

The dictum is also quite within the principle which had previously been affirmed by this Court in the case of *Toms v. Whitby* (1875), 37 U. C. R. 100. I think it right to reiterate these observations because *Castor v. Uxbridge* is sometimes spoken of as a case of no authority. Technically speaking, perhaps it was not so when it was decided, but the dictum is that of the late Chief Justice Harrison, than whom few of our Judges have been more familiar with the municipal law of this country and the principles on which it is administered, and it has received the approval of this Court and, I may add, of the Legislature, which treats damages sustained by reason of an obstruction as being on precisely the same footing as those sustained by reason of an excavation or opening in the highway, which is in either case a cause of the highway being out of repair and rendering the corporation liable for injuries which individuals may sustain thereby: *O'Neil v. Windham* (1897), 24 A. R. 341.

In the case in hand nothing turns on the question whether the corporation had assented to the building being moved along the street or knew of its being moved. There is no by-law of the corporation which prohibits the user of the streets for such a purpose. As the late Chief Justice of this Court observed in *Toronto Street R. W. Co. v. Dollery* (1886), 12 A. R. 679: "The moving of a house along public streets may not be designated as an unlawful user of the highway. It is only a question of degree between a frame building and a huge van of merchandise, beams of timber, etc."

Judgment

OSLER,
J.A.

It cannot, however, be denied that, left as it was, at night, upon or projecting over a considerable part of the travelled highway without some distinct warning by way of a light thereon or otherwise, such a building was likely to be, as in this instance it proved to be, a dangerous obstruction in the highway to persons lawfully travelling thereon without notice of its presence there.

The case is therefore reduced to this: whether the defendants can be held to have had such reasonable notice of the existence of this obstruction in the highway as to make them liable for negligence in omitting to do something to warn travellers of the danger. Upon this question I think the evidence of knowledge on the part of Smith and Scott and Noble that the building was being moved is of no moment. The same may be said of Calverley. All these persons saw the workmen engaged in moving the building—in doing what was a lawful act—and they were not bound to anticipate that it would be left at night as an unguarded obstruction on the street. So also as regards Luke who saw it after the workmen had left it, but yet in daylight, and for all he knew the persons in charge of the job would do what their duty required them to do. The only member of the street committee who saw it in its unguarded condition at a time when it should have been otherwise, was Scott, who was present when the accident occurred, and saw it then and had seen it in the same condition about an hour before.

Judgment.

OSLER,
J.A.

This it seems to me is the utmost on which the plaintiff can rely for the purpose of establishing notice to the defendants. Can this under the circumstances be held to be sufficient notice to charge them with responsibility? I am of opinion that it cannot. The question must always be whether the corporation, not some individual member of the council, has had reasonable notice. Notice to the council, the collective body which represents the corporation, is what the law requires, and that may be proved in a variety of ways, either by notice to some ministerial officer of the corporation charged with the duty alleged to have been neglected, or by actual notice to the council of the existence of the defect, or by shewing that it has existed for such a length of time as, having regard to its nature and to all the other circumstances of the case, makes it probable that the council must have known of it or ought to have known of it through their officer upon whom the duty of taking action in respect of it has been cast. From notice to individual councillors notice to the corporation through the council may no doubt readily be inferred after the lapse of a reasonable time sufficient to enable the council to act by their agents, what is such reasonable time varying according to circumstances. But individual councillors as such are not the agents of the corporation charged in their individual capacity with the duty of removing or protecting obstructions or other defects in the highway and, unless they are at the time engaged in the business of the corporation, notice to one or more of such councillors cannot properly be held to be, at the moment they receive it, notice to the corporation or the council.

I find this subject very fully and satisfactorily considered in the dissenting opinion of Elliott, J., in *Logansport v. Justice* (1881), 74 Ind. 378, 387; and I refer also to *Duck v. Toronto* (1884), 3 O. R. 295; *Bloor v. Delafield* (1887), 69 Wis. 273; *McDermott v. Kingston* (1879), 19 Hun 198; *Dewey v. Detroit* (1867), 15 Mich. 307.

In the case at bar the plaintiff has proved knowledge on the part of one member of the street committee of the

town council, for an hour or two at most before the accident, of the dangerous and careless way in which the obstruction had been left upon the street. Whatever it might be reasonable to infer if a sufficiently long time had elapsed to enable Scott to communicate with the other members of the street committee and to direct action to be taken under the by-law, it is enough to say that the notice to or knowledge of this individual member of the committee, who was not personally the agent of the corporation charged with the duty of removing or guarding the obstruction, cannot, for the reasons already given, be held to have been reasonable notice to the corporation. Had Calverley, the chief constable, acquired notice it might, perhaps, have been different. But as the case stands the appeal must be allowed.

Judgment.

OSLER,
J.A.

This makes it unnecessary to consider whether Deverill would have been liable to the plaintiff. The judgment against him in favour of the corporation falls to the ground simply because there is nothing against which he is called upon to indemnify them. I am not satisfied that if the judgment could have been sustained against the corporation the judgment for relief over against him would be wrong: *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335. He succeeds here solely on the ground that the plaintiff fails against the corporation, who caused him to be added as a third party merely and not as a defendant. He should have no costs.

MACLENNAN, J. A. :—

I agree.

Moss, J. A. :—

[The learned Judge stated the facts and continued:]

The primary question is as to the liability of the corporation to the plaintiff.

In his considered judgment the learned Chancellor finds (1) that there was no contributory negligence; (2) that the

Judgment.

Moss,
J.A.

greater part of the travelled road was obstructed by the building so that but a narrow passage was left to the north where the plaintiff attempted to pass; (3) that there was such shady gloom or darkness at this part that the obstacle created by the building was not obvious to the naked eye, so that the plaintiff and those with him came upon it unawares and unwarned by ordinary observation during the night; (4) that no proper precaution was taken to obviate danger by placing lights on the building or stationing signalmen to warn travellers; and (5) that the corporation, through its officers, had notice of the intention to remove the building along the street and sanctioned its being placed and left where and as it was before six o'clock of the night of the accident.

Of these findings the last alone makes ground against the corporation, and but for it the corporation might safely acquiesce in the others. It was not contended that the corporation could be held liable as for negligence for failure to properly light the streets or highways of the town, and, as was pointed out in *Toronto Street R. W. Co. v. Dollery* (1886), 12 A. R. 679, it is not *per se* unlawful to remove a building from one part of a municipality to another along the public highways. It is an act which, if done in a careful manner, is not liable to injure any one.

The municipality may by by-law regulate the manner of doing it, and in such case parties moving buildings are bound to conform to the terms of the by-law.

Here there was no by-law, and the corporation could not have interfered to prevent the work of removal.

In this view it is not essential to determine exactly what did take place between Heard and the chairman of the committee on streets and improvements, when he was asked to agree to the sidewalk in front of the lot where the building stood being taken up, or when that interview took place. But it may be observed that the by-law providing for the appointment of a committee on streets and improvements, which was put forward as giving to that committee super-

vision and control in all respects over Dundas street, was evidently passed for the purpose of regulating and distributing the supervision and control of the expenditure of the town moneys upon the various streets, and that to the committee on streets and improvements was allotted the supervision and control of the expenditure on Dundas amongst other streets. In terms, at all events, it conferred no authority on the committee to prevent a building from being moved along the street. Smith's assent to the removal of the sidewalk and the fact that every member of the street committee or every member or officer of the council saw the building at various stages of its progress along the street during the day imposed no duty upon the corporation. They saw only a lawful proceeding taking place upon the highway and they were not bound to assume that an unlawful use of the highway was intended.

Judgment.

Moss,
J.A.

Until the building was brought to a standstill for the night, and it was made to appear that from its situation it was likely to become a dangerous obstruction upon the highway, there was no liability upon the corporation, and its subsequent liability, if any, depends upon whether it received notice of the matter and thereafter suffered more than a reasonable time to elapse without taking steps to remove the obstruction or to guard the public against it.

I assume for the present purpose that the presence of such an obstruction is want of repair under the Municipal Act, for which the corporation would be liable. The notice or knowledge imputed to the corporation rests upon the fact that Noble, a member of the streets committee, was present when it was determined to leave the building on the street for the night, and, as a neighbour in conversation with others, agreed that the safest place was between the two electric lights; that Luke, another member of the committee, drove past it about seven o'clock in the evening, and that Scott, a member of the council but not of the streets committee, drove past it about eight o'clock, and was on the sidewalk opposite to and north of the building from shortly before, until

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Moss,
J.A.

the happening of, the accident at 9.30 o'clock. Upon these occasions these persons were engaged in their own individual affairs and were not in any sense on duty on behalf of the corporation. In the State of New York, where the law of municipal liability for want of repair is much the same as ours, it has been held that the fact that an alderman saw work being done upon a highway of the city which resulted in injury to a citizen was not *per se* evidence of negligence on the part of the city: *McDermott v. Kingston* (1879), 19 Hun 198.

Reference may also be made to *City of Warsaw v. Dunlap* (1887), 112 Ind. Rep. 576, and *Cook v. City of Anamosa* (1885), 66 Iowa 427, 8 Am. & Eng. Corp. Cas. 568.

But, assuming that the knowledge of these councillors so acquired should be imputed as notice to the corporation, I do not think it should be so until after the lapse of a reasonable time, during which they could notify the corporation or some officer whose duty it was to act in the premises. The question of what is reasonable must always depend upon the circumstances of each case.

In this case it is sought to hold a municipal corporation liable for negligence because of failure to remove or guard against danger from an obstruction on the highway, where the act of placing it there was not the act of the corporation, where it was only on the highway as an obstruction about three hours before the accident, and where the only notice to the corporation of its existence as an obstruction is based upon the fact that some members of the council became aware of its position some two hours or less before the accident.

The Legislature of the State of Maine has made an effort in the direction of settling the question of length of notice by providing (Revised Statutes 1883, sec. 80), with reference to injuries from defects or want of repair in highways in counties and towns, that the county commissioners, municipal officers, highway surveyors, or road commissioners, shall have twenty-four hours' actual notice of the defect or want of repair before the municipality is to be

liable for damages on account of injuries received in consequence of such defect, thus establishing the principle that where the municipality is entitled to any notice it is entitled to at least twenty-four hours' notice. We have not been provided with any similar guide in this Province.

In this case it appears to me that, having regard to all the circumstances, it ought not to be held that there was sufficient notice to the corporation to establish negligence; and therefore there is no liability on it for the injuries sustained by the plaintiff.

This conclusion disposes of the question of Deverill's liability in this action. The plaintiff did not make him a party defendant jointly with the corporation and cannot claim to hold him liable in this action. He was only added as a third party on the application of the corporation to answer its claim for indemnity. The learned Chancellor held him liable, and upon the assumption that the corporation was liable to the plaintiff I am not at all satisfied that the judgment was erroneous in that respect. At all events, I think the corporation was not acting unreasonably in adding him as a third party.

I would allow the appeal of the corporation and dismiss the action with costs against the plaintiff.

And I concur in the direction that there should be no order as to Deverill's costs of the appeal or defence.

Judgment.

Moss,
J.A.

Appeal allowed.

R. S. C.

LEWIS V. DOERLE.

Will—Charitable Devise—Trust for Benefit of Citizens of the United States of African Descent.

A devise of lands in Ontario, by a testator dying in 1891, in trust "to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights" is a charitable devise and void, and the fact that the trust is to be executed in a foreign country makes no difference.

Judgment of BOYD, C., 28 O. R. 412, affirmed.

Statement. THIS was an appeal by the defendants from the judgment of BOYD, C., reported 28 O. R. 412, in an action for the construction of the will of one John D. Lewis.

The will is set out in the report below, and for the purposes of this report it is sufficient to say that the main question was as to the validity of the devise therein contained of land situate in the city of Toronto to trustees in the United States, to be administered there in trust "to promote, aid, and protect citizens of the United States, of African descent, in the enjoyment of their civil rights." The testator was an American citizen, and died at Philadelphia on the 12th of March, 1891.

The appeal was argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 18th of March, 1898.

W. Barwick, for the appellants. Assuming, as must in this Court be assumed, in view of *Whitby v. Liscombe* (1876), 23 Gr. 1, that the Mortmain Act, 9 Geo. II. ch. 36, was in force in Ontario at the time this will took effect, it is contended that the devise in question is not affected by it. The trust is to be administered in a foreign country where it has been held to be valid: *Lewis's Estate* (1893), 152 Pa. St. 477, and the devise should be upheld. *Curtis v. Hutton* (1808), 14 Ves. 537, would at first glance appear to be an authority that the place of administration makes no difference, but a careful reading of that case shews that the special status of the devisee was in question: see *New v. Bonaker* (1867), L. R. 4 Eq. 655. But taking

the Act as applicable, the devise is not within it. The Argument. doctrine of mortmain is not to be extended: *Cocks v. Manners* (1871), L. R. 12 Eq. 574, and this devise should be held to be a valid one: *In re Macduff*, [1896] 2 Ch. at p. 466. *Farewell v. Farewell* (1892), 22 O. R. 573, goes very far, but it is not consistent with the more recent authorities.

W. Cassels, Q.C., for the respondent. The law of Ontario governs, and the devise is void: Tyssen's Charitable Bequests, p. 291; *In re Doetsch, Matheson v. Ludwig*, [1896] 2 Ch. 836. The case in Pennsylvania decided only that the trust was not too indefinite; the Mortmain Act is not in force there.

W. Barwick, in reply.

May 10th, 1898. The judgment of the Court was delivered by

MACLENNAN, J. A. :—

The question in this appeal is whether the trust in the testator's will to promote, aid, and protect citizens of the United States, of African descent, in the enjoyment of their civil rights, as provided by the fourteenth and fifteenth amendments of the Constitution of the United States, is valid so far as it relates to land in the city of Toronto. The learned Chancellor has held it to be invalid, and I am of opinion that the judgment is right. In *Whitby v. Liscombe* (1876), 23 Gr. 1, it was held in this Court that the Imperial Statute, 9 Geo. II. ch. 36, is in force in this Province, and Mr. Barwick admitted that the question was no longer open for discussion so far as this Court is concerned. The only questions, therefore, calling for any observation seem to be two: First, whether it makes any difference that the trust was to be executed in a foreign country; and second, whether the trust is a charitable trust within the meaning of the statute of George. The first of these questions is answered by *Curtis v. Hutton* (1808), 14 Ves. 537, in which it was held by Sir William Grant

Judgment. that it made no difference where the charitable trust was
MACLENNAN, to be executed. That was a case in which the proceeds of
J.A. land in England were given for a Scotch charity.

Upon the other question I am clearly of opinion that the trust is a charitable trust within the meaning of the statutes. All that was decided in the Pennsylvania Court was that the trust was valid by the law of that State. It does not appear whether the Act of George, or any similar Act, is in force in that State, forbidding gifts of lands to charities, but I should infer that there is not, for the English cases cited in the report of the case are all cases in which the question concerned trusts of pure personalty, and not of interests in land or impure personalty. I am, therefore, of opinion that the appeal fails.

I think, however, one of the answers to the questions, given by the learned Chancellor, should be slightly qualified. The answer to the first question is too wide, and the words "so far as relates to the trust for the promotion, aid, and protection of citizens of the United States, of African descent, in the enjoyment of their civil rights," should be added.

The appeal should be dismissed with costs.

Appeal dismissed.

R. S. C.

POWELL V. TORONTO, HAMILTON AND BUFFALO RAILWAY
COMPANY.

*Railways—Lands Injuriouslly Affected—Operation of the Railway—
Dominion Railway Act, 51 Vict. ch. 29.*

Under the Dominion Railway Act, 51 Vict. ch. 29, compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the land itself and not on personal inconvenience or discomfort to the owner or occupant.

It was held, therefore, that no compensation could be allowed to the owner of land fronting on a street along which a railway company lawfully constructed its line of railway, there being no interference with access to the land except so far as that resulted from the passing of trains.

Re Birely and Toronto, Hamilton and Buffalo R. W. Co. (1897), 28 O. R. 468, considered.

Judgment of FALCONBRIDGE, J., affirmed.

THIS was an appeal by the plaintiff from the judgment Statement.
of FALCONBRIDGE, J.

The following statement of the facts is taken from the judgment of OSLER, J. A. :—

This was an action brought by the plaintiff as the owner in fee of a parcel of land situate on the north-east corner of Hunter and Hughson streets, in the city of Hamilton, claiming a mandamus to compel the defendants to proceed to arbitration in respect to the compensation to be awarded to the plaintiff for damage to her land under the provisions of the Railway Act and the Municipal Act, and to give the notices required in respect of such arbitration or preliminary thereto.

The trial took place before FALCONBRIDGE, J., at Hamilton, without a jury, on the 23rd of October, 1896, and on the 27th of January, 1897, judgment was given in the defendants' favour.

It appeared that the plaintiff's property had a frontage of 155 feet on the north side of Hunter street by 90 feet on the east side of Hughson street. On the latter street there is a dwelling house and shop, and on Hunter street there are several hothouses and greenhouses used by the plaintiff in her business as a florist, which had been

Statement. carried on there for many years past. There is also on the same street a yard with a stable in the rear, to which the only access is from Hunter street. Along that street, adjoining the plaintiff's property, is a sidewalk of about six feet in width.

The railway company was originally incorporated by an Act of the Provincial Legislature, but it was reincorporated by an Act of the Dominion Parliament, 54-55 Vict. (D.) ch. 86 (1891), and their railway declared to be a work for the general advantage of Canada. They are, therefore, having regard to the provisions of that Act, subject to those of the Railway Act of Canada, 51 Vict. ch. 29 (1888), as to all claims for compensation in respect of the exercise of their powers since their reincorporation.

By a by-law of the defendants the city of Hamilton, confirmed by an Act of the Provincial Legislature, 58 Vict. ch. 68 (1895), authority was given to the railway company to carry their railway through and along Hunter street in the manner prescribed.

In the year 1895 the company accordingly constructed their railway along the north side of Hunter street. Between the centre line of that street and the north side of it two lines of rail were laid down, the most northerly of which is so close to the sidewalk that an ordinary car in passing along would overlap it about fourteen inches. On the south of the southerly track a row of poles is erected with wires strung along them for use in opening and closing the railway gates. The width between the poles and the north side of the street is about 32' 7", leaving 19' 6" to the south between the poles and the boulevard.

In the construction of the railway the grade of the north side of Hunter street was raised about 18 inches at the north-east corner of that street and Hughson street, gradually diminishing towards the east until the entrance into the plaintiff's yard was passed. Subsequently the space between the tracks was filled in and planks or timber placed alongside the rails, and the ground levelled. The city raised and levelled the grade of the street on the south

side, so that the access to and egress from the plaintiff's property is the same as before, and is not affected by the construction of the railway save by the existence of the rails in the street. The city afterwards raised the sidewalk along the plaintiff's property, to correspond with the rise in the grade of the street, about two inches higher than the level of the rails. Statement.

The effect of this was to partially block up the circular holes or ventilators in the brick wall of the greenhouses opening on the street; this, it was said, would be injurious to the plants.

The gravamen of the plaintiff's complaint, however, is that owing to the constant passage of cars up and down the tracks, and to the fact that cars will often necessarily be left standing from time to time thereon during shunting operations, she will no longer be able, as she has hitherto done, to back up her carts and waggons against the sidewalk opposite the windows of her greenhouses which open upon the road and take in and put out stuff from these windows, and from the same causes that access into her premises from Hunter street is likely to be constantly interrupted.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 16th of March, 1898.

Robinson, Q. C., and James Chisholm, for the appellant. The learned Judge was wrong in holding that there was no interference with access to the plaintiff's land; the evidence is that the level of the street has been raised and windows and ventilators in the plaintiff's greenhouses obstructed, and access to the land interfered with, and there is clearly a right of action: *North Shore R. W. Co. v. Pion* (1889), 14 App. Cas. 612; *Hendrie v. Toronto, Hamilton and Buffalo R. W. Co.* (1895), 26 O. R. 667; 27 O. R. 46. There is much more shewn than personal inconvenience, and this case is distinguishable

Argument. from *Re Toronto, Hamilton and Buffalo R. W. Co. and Kerner* (1896), 28 O. R. 14, which has been relied on, where the obstruction was a temporary one, coming to an end as soon as the tunnel was finished. Even if, however, nothing more is shewn than inconvenience by reason of the operation of the railway there is a right of action. *Re Birely and Toronto, Hamilton and Buffalo R. W. Co.* (1897), 28 O. R. 468, is a direct authority upon precisely similar facts. The English cases are there collected, and the distinction between the English Act and the Canadian Act is pointed out. *Attorney-General v. Metropolitan R. W. Co.*, [1894] 1 Q. B. 384, may also be referred to. Even under the English Act there are very strong opinions in favour of the allowance of damages because of the operation of the railway, and the cases refusing such an allowance turn on words which are not to be found in our Act. Under our Act it is difficult to see any answer to the right to damages for operation.

Osler, Q. C., and *D'Arcy Tate*, for the respondents the railway company. The construction of the railway has not injured the property, but has in fact improved it, and the question simply is, whether inconvenience resulting from the operation of the railway is the subject of compensation. The question as far as this railway is concerned depends to some extent on special legislation. This railway has special power to operate the railway along a highway: 47 Vict. ch. 75 (O.); 56 Vict. ch. 60 (O.); 58-59 Vict. ch. 66 (D.). The municipality and Legislature could close the highway, and they can clearly close it in part, and that is in effect what has been done here. Apart from this there is no liability for damages for operation. The matter has to be determined mainly with reference to secs. 90, sub-secs. (k) and (o), 92 and 144 of the Railway Act of 1888. Section 92 cannot be distinguished from the provisions of the English Act, and it is clear from these sections that compensation once for all is intended. The appellant's argument would lead to the conclusion that for every act of interference at any time a right of compensa-

tion would at once arise. *Re Birely and Toronto, Hamilton and Buffalo R. W. Co.* (1897), 28 O. R. 468, is a complete departure from the numerous cases in which it has been held that the mere operation of the railway with the prescribed authority—which has been here obtained—is not the subject of compensation. The railway need not necessarily be operated by steam. The same argument would apply to the operation of an electric railway, and all frontagers on the street would be entitled to compensation because the highway is burdened by the user of the railway. Without legislative authority the user would be a nuisance, but with it the user is lawful and not the subject of compensation.

Mackelcan, Q. C., for the respondents the city. The complaint in respect to the sidewalk is frivolous, but even if any right to compensation has, technically speaking, arisen, arbitration is the remedy.

Robinson, Q. C., in reply.

May 10th, 1898. OSLER, J.A. :—

The question is whether the circumstances are such as to give the plaintiff a right to compensation under the provisions of the Railway Act. I do not understand that any substantial claim is made for temporary obstruction caused while the railway was in course of construction: *Ford v. Metropolitan R. W. Co.* (1886), 17 Q. B. D. 12; *Fritz v. Hobson* (1880), 14 Ch. D. 542. As the works now stand they would, if left unused, form no obstruction to the access to the plaintiff's premises. It is, therefore, only the damage anticipated from the use and operation of the railway as interfering with such access hereafter of which she is, if at all, in a position to complain. The case differs then altogether in this respect from such cases as *Parkdale v. West* (1887), 12 App. Cas. 602; *Bowen v. Canada Southern R. W. Co.* (1887), 14 A. R. 1; *Beckett v. Midland R. W. Co.* (1867), L. R. 3 C. P. 82; *Caledonian R. W. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259; *North Shore R.*

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W. Co. v. Pion (1889), 14 App. Cas. 612, where by the actual construction of the railway the access to private property was interfered with and practically destroyed. In cases of that class there is a permanent injury to the estate of the landowner which, upon the principles explained and illustrated in these decisions, entitles him to compensation although none of his land is actually taken. The English cases, however, all recognize the rule as to compensation as settled by the House of Lords in *Hammersmith R. W. Co. v. Brand* (1869), L. R. 4 H. L. 171, viz., that if the injury is caused otherwise than to land, and to land only, by the use of the authorized works, no part of the land having been taken, there is no remedy under the Imperial Acts. The provisions and arrangement of those Acts are no doubt very different from those of our Railway Act as the latter differ also from those of the C. S. C. ch. 66, and of the Ontario Railway Act, R. S. O. ch. 207, but under the one as well as the other the landowner who makes a claim for damage sustained by the execution and user of the authorized works—which in the present instance, it may be said in passing, were executed after compliance with all statutory and municipal preliminaries and conditions—must shew that the Act has expressly given him the right to recover it.

The sections which the plaintiff relies upon as conferring the right to damages caused by the operation or user of the railway are the 90th, which confers the general powers of the railway company, *inter alia* (*g*) to make and construct the railway, (*k*) with one or more sets of rails or tracks and to be worked by the force and power of steam, electricity, etc., and (*q*) to do all other acts necessary for making, maintaining and using the railway; the interpretation clause, section 2, in which the expressions “company,” “railway” and “undertaking” are defined with reference to “authority to construct or operate a railway;” and the 92nd section, which enacts that the company shall in the exercise of the powers granted to them do as little damage as possible and shall make full

compensation in the manner in the general Act and the special Act provided to all parties interested, for all damages by them sustained by reason of the exercise of such powers.

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OSLER,
J.A.

These sections, however, and particularly the last, must be read in connection with the group of clauses commencing with section 136 under the heading, "Lands and their valuation." From a perusal of these clauses it is evident, having regard especially to sections 144 to 147, that the damage intended by section 92 is some actual injury or damage to land, occasioned by the exercise of the powers of the railway. It is, in short, damage of the same character as that for which compensation is recoverable under the English Acts where no land is taken, though it is possible that it also may extend to such damage when caused by the operation as well as by the construction of the railway. That question, however, is one which does not call for decision in the present case, for while the damage the plaintiff complains of and in respect of which she seeks a mandamus, is damage which she anticipates from the operation of the railway, it is not such damage as the Act gives compensation for. Under the Canadian Act, whether the damage results from the construction or from the operation of the railway, it must be held, as under the Imperial Acts, that, arising as it does from works authorized by the Legislature, it must be such as would apart from the statute have been the subject of an action, and it must also be such as to diminish the value of the property irrespective of any particular use which might be made of it. In determining, on these principles, what is such damage when arising from the operation of the railway, we may properly apply the decisions under the Imperial Acts, of which I specially refer to *Caledonian R. W. Co. v. Ogilvy* (1856), 2 Macq. 229, and *Caledonian R. W. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259, which appear to me to be entirely opposed to the validity of the claim which the plaintiff puts forward. Direct and immediate access between the street and her premises

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is not affected. Her damage is of the same character as that complained of in the former of these two cases, a matter of personal inconvenience to herself not an injury to her estate in the land. It is, as put by the Lord Chancellor in the *Ogilvy* case, damage not "different from that which might be sustained by any other subjects of Her Majesty; for all attempts at arguing that this is a damage to the estate is a mere play upon words. It is no damage at all to the estate, except that the owner of that estate would oftener have a right of action from time to time than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it." I refer also to the observations upon this case made in the addresses of the law lords who took part in the decision of the *Walker* case at pp. 278, 289, 295 and 303 of the report. See also *Brodeur v. Boxton Falls* (1882), 11 Rev. Leg. 447.

Upon the whole I think that the judgment at the trial was right and that no sufficient case was made for granting a mandamus. It is difficult to understand why the city was made a party to the action. I entirely concur with the learned Judge in thinking that the damage said to have been caused by the raising of the sidewalk was of too trivial a character to be taken into consideration.

I do not dwell upon the decision in the case of *Re Birely and Toronto, Hamilton and Buffalo R. W. Co.* (1897), 28 O. R. 468, because although damages appear to have been awarded there in respect of the operation of the railway the nature of such damages is not disclosed by the report.

MACLENNAN, J. A. :—

Action against the railway company and the corporation of Hamilton, for a mandamus to assess compensation due to the plaintiff for damages to her property situate at the intersection of Hunter and Hughson streets, in the city of Hamilton. The railway has been constructed upon and along the half of Hunter street adjacent to the plaintiff's land, with a double track; the rails lying close to a

sidewalk only about six feet wide between them and the plaintiff's land. It is complained that the grade of the rails is eleven inches above the original road bed at the intersection of the two streets, gradually falling to the original level for ninety feet, and going below it for the remaining sixty feet along the plaintiff's frontage, whereby access to her land has been rendered more difficult and less convenient.

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J.A.

Her complaint against the corporation of Hamilton is that they have raised the side-walk to conform to the grade of the railway, causing injury to her property. She also claims damages from the city for not keeping Hunter street in repair.

The action was dismissed against both defendants.

The railway having been constructed as it was, it apparently became necessary and proper for the city to raise the sidewalk so as to make it conform to the new level of the street with the railway track upon it. The learned Judge found that the injury to the plaintiff from that cause was trivial and inappreciable. That finding was well warranted by the evidence, for the plaintiff's husband, giving evidence in her behalf, says that with a good street and sidewalk raised up as it is, but with no railway there, it would be doing very little harm. The plaintiff made no attempt either to prove any special damage on the ground of disrepair. I therefore think the action was properly dismissed as against the city corporation.

The question remains whether the plaintiff has made out a case for compensation against the railway company.

The action being for a mandamus to compel arbitration, admits that the railway works have been lawfully and properly constructed just as they are, and the sole question is whether the plaintiff has proved that kind of injury for which the statute has authorized the recovery of compensation. It might be a question, looking at the Provincial and Dominion Acts applicable to the company, whether it is not the Provincial Railway Act upon which the plaintiff's right to compensation depends. In her statement of

Judgment. claim she puts it upon the Dominion Railway Act, and it
MACLENNAN, was so treated by all parties on the argument before us.
J.A. I do not think it makes any difference, for, so far as applicable to the present case, I think there is no substantial difference between the Provincial and the Dominion Acts. The Ontario Railway Act gives compensation for lands "injuriously affected," in express terms, just as did the Consolidated Statute of Canada; while the Railway Act of the Dominion, 1888, does not use these words. It was, however, held by this Court in *Bowen v. Canada Southern R. W. Co.* (1887), 14 A. R. 1, that the effect of sec. 9, sub-secs. 10 and 12, of the Act of 1879, which are substantially the same as sec. 144 *et seq.* of the Railway Act of 1888, was to give to landowners a right to compensation for lands injuriously affected even though the land was not actually taken. The same construction was put upon these sections by the Judicial Committee of the Privy Council a few months later in *Parkdale v. West* (1887), 12 App. Cas. 602. The only difference between the Act of 1879, and the Railway Act of 1888, affecting this question, is section 92; then enacted for the first time in Canada, but which is identical with a clause of sec. 16 of the English Railways Clauses Act, 8 & 9 Vict. ch. 20. Our law is, therefore, substantially the same as the English law, and it is settled by numerous cases that a landowner is not entitled to any compensation for depreciation in the value of his property arising from the mere fact that a railway has been constructed and is operated upon a street in front of his property. His property may be depreciated in value by reason of the noise, vibration, smoke, etc., but for those things he can make no claim.

Mr. Robinson contended strenuously that by reading the new section 92 along with sections 144 *et seq.*, compensation for such damage was provided for. I do not think so. I cannot distinguish this section 92 from the corresponding clause in the English Act. In *Hammersmith R. W. Co. v. Brand* (1869), L. R. 4 H. L. 171, Lord Cairns said everything that could be said in support of the view

contended for by Mr. Robinson, but his argument did not prevail, and that case has been followed ever since: *Caledonian R. W. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259: *Attorney-General v. Metropolitan R. W. Co.*, [1894] 1 Q. B. 384. In the present case, therefore, the plaintiff can claim no compensation unless she can shew that her land has been injuriously affected by the company's work upon the street in such a way that if not authorized by statute she could have brought an action against them as for a nuisance. To enable her to do that she would have had to shew that she has suffered some special damage peculiar to herself, such as that by embankment or excavation her access to her land from the street has been cut off or obstructed or rendered substantially inconvenient, whereby the value thereof has been lessened. In such a case she would be entitled to compensation: see the cases collected in Brown and Allan's *Law of Compensation*, p. 137. The plaintiff, however, has failed to make out a case of that kind. In his evidence, her husband admits that there is no material obstruction, and that there is nothing to complain of in turning or entering into the yard.

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MACLENNAN,
J. A.

I therefore think that the action was rightly decided, and that the appeal should be dismissed.

Moss, J. A.:—

I also am of opinion that the appeal fails. The plaintiff presents no claim for compensation for land taken from her or for materials taken from her land. Her only claim against the railway company is that her land on the north-east corner of Hunter and Hughson streets is injuriously affected, and that for the damage thus sustained she is entitled to compensation in the manner provided by the *Railway Act of 1888*.

Section 92 provides that the railway company shall make compensation in the manner therein and in the special Act provided to all parties interested for all dam-

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age by them sustained by reason of the exercise of the powers conferred.

A reference to sections 144 to 147 inclusive, shews that the damage sustained for which compensation is to be made is damage to land either from taking materials or on account of its being injuriously affected by the exercise of any of the powers granted to the railway.

And it is well settled that the compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the estate or land itself and not on personal inconvenience or discomfort to the owner or occupier.

I think the plaintiff has failed in this case to shew any such damage or injury to her land from any cause whatever.

She is obliged to treat the right of the company to occupy the highway with its line as an accepted fact, and with that in view establish a case of her land being injuriously affected within the meaning of the Railway Act.

Her access to and from her land to the highway is not cut off. On the contrary, it is shewn on the testimony of her husband, that but for the fact that the company's trains traverse the line the highway is not rendered more difficult of user in connection with her premises.

I think the decided cases upon the question of the nature of the damage to be sustained in order to give a claim for compensation as for land injuriously affected are applicable and they are adverse to the plaintiff's claim.

BURTON, C.J.O., concurred.

Appeal dismissed.

R. S. C.

MOORHOUSE V. KIDD.

Principal and Surety—Counter Security—Right to Enforce—Depreciation—Contribution.

Where the principal debtor gives to his sureties counter-security by mortgage of real estate, any of the sureties is entitled, after the principal debtor's default, to enforce the security without the consent or concurrence of the others, and it is not an answer to a claim for contribution by one surety who has paid the whole debt that the security has depreciated in value and that the paying surety has refused to take any steps to enforce it.

Judgment of STREET, J., 28 O. R. 35, affirmed.

THIS was an appeal by the defendant from the judgment Statement.
of STREET, J., reported 28 O. R. 35.

The action was brought by one surety against a co-surety for contribution, and the defence was that the plaintiff had refused and neglected to enforce a counter-security given by the debtor to the sureties. The facts are stated in the report below, and in the judgment in this Court.

The appeal was argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ.A., on the 7th of April, 1898.

McCarthy, Q. C., for the appellant. The plaintiff had control of the security, and ought to have enforced it. Not having done so, and the security having depreciated in value, he cannot claim contribution: *Wulff v. Jay* (1872), L. R. 7 Q. B. 756; *Synod of Toronto v. DeBlaquiere* (1880), 27 Gr. 536; Supreme Court Digest, p. 539; *Ryan v. McConnell* (1889), 18 O. R. 409; *Padwick v. Stanley* (1852), 9 Ha. 627; De Colyar, 3rd ed., p. 438.

Aylesworth, Q. C., for the respondent. The respondent had no special control of the security; it was given to, and was for the benefit of, all the sureties, and the appellant might at any time have enforced it. The respondent was under no obligation to take proceedings.

McCarthy, Q. C., in reply.

May 10th, 1898. The judgment of the Court was delivered by

Judgment. MACLENNAN, J. A. :—

MACLENNAN,
J.A.

The plaintiff, the defendant, one Loucks, and a brother of the plaintiff, made a joint and several promissory note, on the 13th of March, 1891, for \$1,600, payable to one McLaren, six months after date, and on the same day they made a similar note, dated the 16th of September, for the same amount, also at six months from date, the second note intended to be a renewal of the first, in case the latter was not paid at maturity. The plaintiff, the defendant and Loucks were mere sureties to the payee for the other maker of the notes. On the 18th of March, 1891, the principal debtor executed a mortgage upon land in Manitoba to the three sureties, expressed to be by way of security to them for their liability upon the note and renewal. The mortgage was in the usual form, with a power of sale upon one month's default on ten days' notice. It was duly registered in the proper office in Manitoba on the 31st of March, 1891, by the deposit of a duplicate, and the other copy remained in the possession of the solicitor who prepared it, who had acted for all parties. There was a prior mortgage upon the land for \$2,500, a balance of purchase money, and it is admitted that at that time, and for a year or two after the maturity of the notes, the land was good security for both mortgages, and it is also not disputed that it has since fallen in value, so as not to be worth more, or much more, than the first mortgage debt. At the time of the trial, however, it was still the property of the mortgagor, subject to the mortgages. The principal debtor did not pay the note at the maturity of the renewal, and the plaintiff shortly afterwards paid \$900, part of it, with his own money, and the remainder with money obtained from a bank on a promissory note made by himself and Loucks. The plaintiff then called upon the defendant for contribution of one-third of the \$900 which he had paid, and the defendant not having paid brought the present action on the 27th of January, 1896, to recover it. Several defences were pleaded, but that relied upon at the trial

was, that soon after payment by the plaintiff, the defendant had applied to him for the mortgage, and that he refused to deliver it to him for the purpose of instituting proceedings thereon, or to institute proceedings thereon himself, whereby the defendant's rights were prejudiced, owing to the land having since greatly depreciated in value, and by reason whereof he was discharged from liability.

The learned Judge finds that the plaintiff refused to give up the mortgage; that he, through his solicitor, had possession of the mortgage, and refused to deliver it up; and also, that he refused to give it up because he did not wish his brother harassed. I think that is hardly an accurate statement of the evidence. The defendant's own statement is that he said to the plaintiff: "Let us proceed on the mortgage, the security is good for it, we can sell the equity of redemption and recover it." To which he said: "Why, you will put my brother on the street." The defendant then said: "Where is the mortgage?" He said: "I know where it is, it is all right;" and I said: "Where is it?" And he said: "It is all right, you need not trouble yourself about that." That is the whole evidence of a refusal by the plaintiff, and at that time the mortgage was in the possession of the solicitor who had drawn it, and who held it for all parties, to the knowledge of the defendant. The defendant concluded the discussion with the plaintiff by saying: "I will write to Manitoba and find out the cost of foreclosing the mortgage." The defendant is himself a solicitor, and he admits having written to find out the cost of foreclosure.

The defendant had relations with the mortgagor, before and after the mortgage. He had been his surety for the same debt for some time before the plaintiff had joined him in the suretyship, and the note to McLaren was to discharge a previous liability of the debtor, for which the defendant was his surety. He not only knew of the mortgage when it was made, but gave the solicitor who prepared it, the name of the registrar to whom it was to be sent for registration. He had acted for the debtor

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J. A.

Judgment. in respect of his title to the mortgaged lands, and was at
MACLENNAN, the date of the mortgage acting for him in endeavouring to
J.A. sell the lands for him; and in a letter to the plaintiff,
dated the 13th of November, 1891, he says he has had no
offer for it so far, but that it appeared to be a good invest-
ment, and that perhaps it would be well for the debtor to
hold it. Under these circumstances the learned Judge held
that the defence failed, on the ground that the plaintiff
was not bound to take, or to concur in taking, at the re-
quest of the defendant, steps to enforce the mortgage, upon
pain of relieving the defendant from his liability to con-
tribute, to the extent of any loss by depreciation in value
by delay. I am of opinion that the judgment is right.
Mr. McCarthy relied on a case of *Wulff v. Jay* (1872),
L. R. 7 Q. B. 756, and also upon *Synod of Toronto v.*
DeBlauquiere (1880), 27 Gr. 536, affirmed in this Court,
and in the Supreme Court, and other similar cases. But
those cases were not at all like the present. In *Wulff v.*
Jay, the surety was discharged to the extent of the loss,
by reason of the creditor not registering a bill of sale, and
not taking possession of the debtor's goods after default,
and notice of his insolvency, whereby they were lost by
his subsequent bankruptcy. But there the creditor alone
could, and the surety could not, have done the acts, the
omission of which occasioned the loss. So also in *Synod*
of Toronto v. DeBlauquiere, the defendants could not them-
selves have compelled McQueen to pay the interest on his
mortgage, so long as the Ross mortgage was undischarged,
which it was the plaintiff's duty to pay off, and at p. 549
the Vice-Chancellor puts the case on the ground that the
assignment had removed the property from the control of
the debtor and placed it within the control of the creditor.
In the present case the mortgage, which was the common se-
curity for the three sureties, was made to them all. Each had
the same and an equal right to enforce it, a right which in
no degree depended on the consent or concurrence of the
others. Before the Judicature Act the rule in equity was
that one of two, or more, having a joint or common right
of suit could sue in his own name if the other, or others,

refused to be plaintiffs; all he had to do was to make them defendants: Daniel's Chancery Practice, 5th ed., p. 189; *Davenport v. James* (1847), 7 Ha. 249. The rule is now the same in the High Court, therefore the defendant could, notwithstanding any refusal by the plaintiff, have himself brought an action to make the mortgaged land available for his indemnity at any time after the debtor's default. Nor did it make any difference, as he seems to have supposed, that the plaintiff and Loucks had paid the debt, and he had paid nothing. Although he was no longer liable for the whole debt to McLaren, he was still liable for a third of it to the plaintiff and Loucks, and the mortgage was a security to him for his indemnity in the one case quite as much as in the other. Although a surety could not sue the debtor at law in his own name before payment, he could always do so in equity, if the creditor refused. See the cases collected, DeColyar, 3rd ed., pp. 299, 300; 2 W. & T. L. C., 7th ed., p. 604. So here the plaintiff and Loucks having become creditors in place of McLaren, if they refused, the plaintiff could at once proceed in his own name. It is therefore clear that the plaintiff's refusal to sue, or to concur in suing, was no hindrance to the defendant in realising the security, and could therefore be no damage to him. Nor is there anything in the plaintiff's refusal to deliver the mortgage to the defendant, even if it had been in his possession. The defendant had full knowledge of its contents, and there was a duplicate original accessible to him in the registry office, as he well knew. But the fact was that it was not in the plaintiff's possession, but in that of the solicitor, who held it for all parties. The defendant had the same right to it as the plaintiff, and the same right to the inspection and use of it in the hands of the solicitor.

I am therefore of opinion that the loss by depreciation in the value of the security can not be attributed to the plaintiff any more than to the defendant, and that the appeal should be dismissed: see *Hardwick v. Wright* (1865), 35 Beav. 133.

Judgment.
MACLENNAN,
J.A.

THACKERY V. TOWNSHIP OF RALEIGH.

Drainage—Land Injuriouslly Affected—Appeal to Court of Revision—Claim for Damages—Sufficiency of Notice—Filing Notice—Arbitration.

Under the drainage clauses of the Municipal Act of 1892, a landowner who is injuriously affected by a drainage work and who is assessed for part of the cost is not bound to appeal to the Court of Revision for the allowance to him of damages to be set-off against his assessment; he has his remedy by arbitration or action.

Ellice v. Hiles (1894), 23 S. C. R. 429, considered and distinguished.

Whether such a claim is made by application for arbitration or by action is immaterial; in either event the Drainage Referee has jurisdiction to deal with it.

The provision of sub-section 3 of section 93 of the Drainage Act, 1894, requiring a copy of the notice of claim to be filed with the County Court Clerk is directory and not imperative, and recovery is not barred where notice of the claim is duly given to the municipality and an action commenced within the time limited but a copy of the notice is not filed.

A notice that the claim is for damages sustained "by reason of the enlargement and construction" of the drain in question is sufficient to support a claim for damages for interference, because of the drain, with access to part of the claimant's farm.

Judgment of the Drainage Referee affirmed.

Statement. THIS was an appeal by the defendants from the judgment of the Drainage Referee.

The action was brought to recover damages sustained by reason of the construction of a drain known as the Raleigh Plains Drain, and before action the following notice was served by the plaintiff upon the defendants:

To the corporation of the township of Raleigh:

Take notice that I hereby demand from you the sum of five hundred dollars damages, which I have sustained by reason of the enlargement and construction of the Raleigh Plains Drain through my property, the south half of the north half of lot number twelve in the sixth concession of Raleigh.

And in case you refuse to pay me the said damages or settle with me forthwith, I hereby require you to arbitrate respecting said damages, and to appoint an arbitrator on your behalf for that purpose.

I hereby nominate and appoint James Clancy, arbitrator on my behalf.

Dated this 10th day of February, 1897.

This notice was not filed in the office of the clerk of the Statement.
County Court.

The action was referred to the Drainage Referee, who on the 16th of July, 1897, gave the following judgment in the plaintiff's favour :—

MR. HODGINS, Q. C. :—

One of the chief defences to this action is that the plaintiff's claim for damages and compensation consequent upon the construction of the drainage works referred to in the pleadings, should have been brought under the provisions of sec. 93 of the Drainage Act, 1894, 57 Vict. ch. 56 (O.), which provides that such claims shall be referred to the arbitration and award of the referee under the drainage laws, and be instituted by a notice claiming damages or compensation stating the ground of the claim, which notice must be served upon the proper parties, and a copy of it with an affidavit of service filed with the clerk of the County Court—such service and filing to be made “within one year from the time the cause of complaint arose.”

The municipal proceedings for the enlargement of the Raleigh Plains Drain (originally constructed in 1864) were commenced in 1892, but owing to certain litigation were not completed until the 17th of June, 1895, when the by-law authorizing the work was finally passed by the council.

The plaintiff's claim was instituted by a writ of summons issued on the 6th of April, 1897, followed by pleadings in which the defendants raise the defence above referred to and others.

Among the documents put in at the trial there is a notice signed by the plaintiff dated the 10th of February, 1897, and served the same day on the reeve of the defendant municipality.

The first questions I have to consider are whether the provisions of sub-sec. 3 of sec. 93 of the Drainage Act bars the plaintiff's claim : and if it does not, whether the notice

Judgment. is sufficient under the statute, and if not, whether it is
MR. HODGINS, amendable under sub-sec. 2 of sec. 89.
Q.C.

There is, I think, a clear distinction between statutory directions which must be construed as imperative, and those which may be construed as directory; or, as Lord Hale puts it, "directive" (2 Hale's P. C. 50). "I understand the distinction," says Mr. Justice Taunton, in *Pearse v. Morrice* (1834), 2 A. & E. at p. 96, "to be that a clause is directory where the provisions contain mere matter of direction and nothing more but not so where they are followed by such words as that anything done contrary to such provisions shall be null and void to all intents." The distinction was further pointed out by Lord Tenterden, C. J., in *Rex v. Justices of Leicester* (1827), 7 B. & C. 6, where he held that negative words in a statute would have to be construed as imperative, but that where words were used only in the affirmative, it would be proper to hold that the provision in the statute was merely directory. And Lord Coleridge, C. J., in *Woodward v. Sarsons* (1875), L. R. 10 C. P. at p. 746, defined the general rule applicable to such provisions to be that an absolute or imperative enactment must be obeyed or fulfilled exactly, but that it is sufficient if a directory enactment be obeyed or fulfilled substantially.

The cases further shew that where statutes prescribe a particular time for the doing of an act, and there are no negative provisions indicating that the act if not done at the prescribed time shall be invalid, the act may be done at a later time: see *Rex v. Sparrow* (1739), 2 Str. 1123. When a statute is merely directory a thing omitted to be done at the proper time may be done afterwards: *Rex v. Loxdale* (1758), 1 Burr. 445.

Thus, as decided in *State v. Lean* (1859), 9 Wis. at p. 292, when there is no substantial reason why the thing to be done might as well be done after the time prescribed as before, no presumption that, allowing it to be so done, it may work an injury or wrong, the Courts assume that the intent was that if not done within the time prescribed, it might be done afterwards.

Another canon of construction is that when it is con- Judgment.
tended that the Legislature intended to take away the MR. HODGINS
private rights of individuals, such an intention must appear Q.C.
in the statute by express words or necessary implication:
see *Metropolitan Asylum District v. Hill* (1881), 6 App.
Cas. 193; *Western Counties R. W. Co. v. Windsor and*
Annapolis R. W. Co. (1882), 7 App. Cas. at p. 188.

The plaintiff's claim is one which comes within the provisions of section 93, which, if barred by the operation of sub-section 3, would, in my judgment, subject him to loss, and negative the maxim *ubi jus ibi remedium*. But his notice of claim and reference to arbitration though not strictly in the form intended by the Act, may, I think, be sufficient for the purposes of my jurisdiction, and I give leave to amend the same and to file it with the proper officer as directed by the Act.

This being done, I find that the plaintiff is entitled to recover damages and compensation for the injury done to his property in the construction of the drainage works or consequent thereon. And on the evidence I find that the amount tendered to him for the quantity of land taken, and damages caused by the dumping of the earth on his land, being \$102.50, covers all the damages he is entitled to, except the cost of the construction of a bridge across the drain to connect the two several portions of his farm. If the parties cannot agree as to the cost of that, the defendants may construct a bridge to be approved of by me, or I will let the parties put in affidavits giving the exact dimensions of the proposed bridge according to the estimates given at the trial, and I will assess the amount to be allowed to the plaintiff for the bridge.

As the plaintiff's initiatory proceedings were irregular in not being instituted under section 93 of the Act, I think he must pay the defendant's costs up to and inclusive of the order of reference. Subsequent costs, including the trial and entry of judgment, I allow to the plaintiff against the defendants and I allow one set of costs to be set off against the other.

Statement. The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 28th of January, 1898.

M. Wilson, Q.C., for the appellants.

W. Douglas, Q.C., for the respondent.

May 10th, 1898. OSLER, J. A. :—

Appeal by the defendants from the judgment of the Drainage Referee.

The action was commenced by writ issued on the 6th of April, 1897. The plaintiff sues as owner and occupant of the south-east half of the north-west half of lot 12 in concession 6, Raleigh, alleging that the defendants have constructed a drain through his farm dividing it into two parcels and depriving him of access from one part to the other.

The drain is 75 feet wide and about 9 feet deep with a bank piled up on each side of it 9 feet high. The base of the west bank is 46 feet wide and of the east bank 35 feet wide. The plaintiff's land has been heavily taxed for drainage but he can obtain no advantage from this drain without constructing tile drains under these banks to carry off the water into the drain. He will be compelled to fence in the sides of the drain and to build a bridge across it to obtain access from one part of his farm to the other. Four acres and sixty-nine one-hundredths of the plaintiff's land have actually been taken for the drain. The defendants refuse to pay him any adequate compensation, and he claims \$500 damages and the costs of this action.

The only parts of the statement of defence which need be noticed are those which plead that the action was not brought in time as required by the provisions of the Municipal Act and Drainage Trials Act; that an action is not maintainable at all, and that if the plaintiff has any claim, which is denied, it is the subject only of arbitration;

that the plaintiff did not serve the defendants with a notice claiming damages and the grounds thereof, and file it in the office of the Clerk of the County Court of Kent, within one year from the time the cause of complaint arose, as required by the Drainage Trials Act; that the drain was constructed under the provisions of the municipal law relating to drainage and of a by-law of the defendants authorizing its construction and making an assessment therefor; that the plaintiff's land was assessed for benefit, and that such assessment remains against the land as a legal adjudication and charge thereon and that the plaintiff is now debarred and estopped from alleging that his land was injured and damaged and not benefited by such drainage.

Judgment.

OSLER,
J.A.

Before any further pleadings in the action an order was made by the County Judge on the 5th of June, 1897, on the plaintiff's application, referring the action and the matters at issue therein to the Drainage Referee, "preserving and reserving to the defendants the right and benefit of any and every defence and objection to the claims made by the plaintiff."

This order was made under the authority of section 94 of the Drainage Trials Act. It has not been complained of and does not appear to be open to objection. The intention of the Legislature in passing that section evidently was that in prosecuting a just claim for compensation or damages a claimant should no longer be liable to be defeated merely because he happened to have sued for it in an action instead of proceeding by arbitration.

The action was accordingly tried before the Drainage Referee, Mr. Hodgins, in July, 1897, who found that the plaintiff was entitled to recover damages and compensation for the injury done to his property in the construction of the drainage works and consequent thereon; that the amount tendered to the plaintiff for the quantity of land taken and damage caused by dumping earth on his land, being \$102.50, covered all the damage he was entitled to except the cost of the construction of a bridge across the drain to

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connect the two several portions of his farm which was to be afterwards determined by him on further evidence if the parties could not agree as to the same.

I am not entirely satisfied that the report is complete or that the appeal is regularly brought before us in the shape in which the proceedings now stand, but as neither of the parties has raised any objection I think we may deal with the case *quantum valeat*.

It appears that in the year 1892, the defendants passed provisionally a by-law for deepening, extending, widening, straightening and otherwise improving an important drain, known as the Raleigh Plains Drain, which had been constructed several years previously.

The report of the engineer, set forth in the by-law, shewed that lands in the townships of Tilbury East and Harwich would be benefited by, and were chargeable for outlet for, the proposed improvement.

The cost of the whole work was estimated at \$56,190, which included a sum of \$4,000 for five road bridges and an item of \$1,765 for land and damages "as per list."

This list was referred to in the report as annexed thereto, as were also the specifications for the work and the schedules of the assessment on the lands and roads in Raleigh, Harwich and Tilbury East benefited and using this drain as an outlet.

The plaintiff's land was scheduled as assessed for benefit and outlet and to cover interest on debentures for twenty years \$166.16, payable by a yearly rate of \$8.308.

The list of lands and damages in respect of which the item of \$1765 was charged, was not set forth in the by-law nor published, nor was it produced in the case. The evidence of one of the township officials was to the effect that the plaintiff was put down there as entitled to damages to the amount of \$35. This did not include any allowance for a bridge across the drain from one part of his farm to the other. The engineer who made the examination and report, if living, was not called as a witness.

Litigation ensued over the by-law in consequence of

which it was not finally passed until the 17th of June, 1895. Judgment.

OSLER,
J.A.

In the meantime the Court of Revision for the trial of complaints against the assessment in Raleigh, notice of the sitting of which was duly published when the provisional by-law was published, was duly adjourned from time to time.

The plaintiff did not appeal against his assessment.

The work on the drain was done through the plaintiff's farm during the months of May, June and July of 1896. As originally constructed the drain was about 45 feet in width and there was a bridge crossing it from one part of the farm to the other. As widened and improved it was made 75 feet in width at the top and about 65 at the bottom and 9 feet in depth. Including the land at the sides of the drain covered with earth taken from the drain and used in the embankments about four and sixty-nine one-hundredths acres of the farm were made use of, and about four-fifths of an acre more than in the old drain was taken up in the actual width of the new one from bank to bank. The old bridge was necessarily taken out but the defendants refused to replace it by a new one and no allowance was made for a new one in the engineer's estimate for land and damages appended to his report.

The defendants tendered the plaintiff \$102.50 for damages. This was done some time before the action, but exactly when did not appear. It was probably some time in 1895. They had paid other ratepayers whose lands were affected sums in several instances considerably in excess of those which the engineer had allowed in his damage list, but except as so far as they allowed these persons for bridges across the drain it was said that these sums were in the same proportion, generally speaking, to that which they had offered the plaintiff.

On the 10th of February, 1897, the plaintiff served the defendants with notice demanding \$500 damages sustained by him by reason of the enlargement and construction of the drain through his property and thereby required them

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in case they refused his claim to arbitrate and to appoint an arbitrator in respect of it. The defendants having taken no notice of the demand, the plaintiff on the 6th of April, 1897, brought this action.

The claim must be regarded as limited to compensation for damage to land by depositing earth thereon taken from the drain and to damage caused by severance; a claim, in other words, for damage done in the construction of drainage works or consequent thereon: Act of 1891, 54 Vict. ch. 51, sec. 9 (O.); Municipal Act of 1892, 55 Vict. ch. 42, sec. 591 (O.); Drainage Act of 1894, 57 Vict. ch. 56, sec. 93, sub-sec. 1 (O.).

The Acts in force when the proceedings of the council were initiated were those of 1891 and its amending Act, 55 Vict. ch. 57, and the Municipal Act of 1892. The Drainage Trials Act came into force on the 1st of June, 1894.

The question is whether the plaintiff is entitled to recover anything under either of the heads of damage claimed. So far as the amount actually awarded is concerned, apart from what may hereafter be allowed by the referee in respect of severance, the defendants seem to have no reason to complain, as it is the amount they were willing to pay before action and is by no means an excessive sum for the injury caused to the plaintiff's farm by the dumping of soil thereon on the banks of the drain.

Sections 483 and 591 of the Municipal Act of 1892 are the landowner's charter; the first provides that the council shall make to the owners or occupiers of or other persons interested in real property entered upon, taken or used by the corporation in the exercise of its powers, due compensation for any damages, including the cost of fencing when required, necessarily resulting from the exercise of their powers beyond any advantage which the claimant may derive from the contemplated work.

This claim if not mutually agreed on is to be determined by arbitration under the Act; it is to be made within a year from the time when the alleged damages were sustained or became known to the claimant or in case of a continu-

ance of damage from the time when the cause of action arose or became known to the claimant. That limitation, however, does not extend to real property taken or used by the corporation.

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 OSLER,
J.A.

The Act provides machinery for ascertaining the value of the property by arbitration, sections 385, 396, but in the case of disputes "as to damages alleged to have been done to property in the construction of drainage works or consequent thereon," which is what section 591 refers to, the complainant "may refer the matter to the award of the Drainage Referee who shall hear and determine the same and give in writing his award and decision and his reasons therefor:" section 591. The Drainage Referee was substituted in this section for the arbitrators referred to in sections 385, 396, by section 9 of the Drainage Trials Act, 1891, 54 Vict. ch. 51. See the Municipal Act, R. S. O. 1887, ch. 184, sec. 591, which provided that the claimant might "refer the matter to arbitration, as provided in this Act; and the award so made shall be binding on all parties."

In the case of drainage works constructed under the local improvement clauses of the Municipal Act of 1892, it is observable that there is no express reference in section 591 or elsewhere to the cost of the land through which the drain is actually made and which is expropriated for the construction of the drain itself.

The council are to procure plans and estimates to be made of the work and an assessment of the real property to be benefited by the work shewing as nearly as may be in the opinion of the engineer the proportion of benefit to be derived therefrom by each lot. And by sub-section 3a of sec. 569 (Drainage Act, 1894, sec. 86), the cost of any reference had in connection with the construction of any works, cost of publication of by-laws and all other expenses incidental to the construction of the works and the passing of the by-laws shall be deemed part of the cost of the works and included in the amount to be raised by local rate. Under this provision no doubt the cost of land necessary to be acquired for the construction of the drain would

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form part of the estimate, but it is needless to say that in the great majority of cases the land would be worthless to the owner for any purpose except that of constructing the drain for the improvement of the rest of his property. And it is on that in general well-founded assumption that the engineer's estimate of the cost of construction may be safely based. Nevertheless where land which has an independent value is taken for the purpose of the drain or is injuriously affected by reason of the construction of the drain, the owner's right to compensation is clear and it ought to be ascertained in the manner provided by the Act.

The engineer is not the person to settle it, though he may place in his estimates, as he has done here, a sum which he thinks sufficient. If accepted the claim would thus be settled by mutual agreement. The engineer's duty is to assess against each lot that proportion of the cost of the work which he thinks it ought to bear for the benefit it will derive from the work. I do not see that any power has been conferred upon him to set off benefit against damage. The same observation applies to the Court of Revision; they are not, any more than is the engineer, the tribunal constituted by the Act to assess the owner's right to, and the amount of, his compensation. Were I free to do so I should be disposed to hold that the two subjects—compensation and benefit—were distinct, so far as assessment for the latter is concerned, for if benefited at all the land must be treated as land liable to assessment and must bear its proper proportion of the cost of the work which necessarily includes all the land damages incurred in the construction of the work or consequent thereon, whether ascertained by the engineer and accepted by the owner as I have already mentioned or subsequently ascertained by award of the referee or otherwise as provided by sections 592 and 483.

Suppose, *e.g.*, upon an appeal to the Court of Revision, that Court were to say, "It does seem that you are damaged to the extent of five times the amount you have been

assessed for, we therefore strike off the assessment." The claimant then proceeds to recover his damages by arbitration. As his land has thus not been assessed for benefit, it can not be charged with any portion of these damages, which, as being benefited in fact, it ought to be (section 592). The proper procedure evidently is to assess the lands for whatever sum they appear to be benefited—the work of the engineer and Court of Revision—and to allow the owner his damages less any advantage he derives from the work, from which advantage may be deducted the special assessment, since to that amount the owner is already liable to pay for the improvement—the work of the arbitrator or referee. Any sum thus allowed to the owner is then chargeable *pro rata* under section 592, upon all the lands liable to assessment for the drainage work.

Judgment.

OSLER,
J. A.

I am of opinion, therefore, that the plaintiff did not lose his right to claim the damages sought in this action merely by neglecting to appeal to the Court of Revision, and I think the case quite distinguishable from *Ellice v. Hiles* (1894), 23 S. C. R. 429, on the ground that here the engineer shews that he has kept the assessment for benefit distinct from any claim for damages by allowing, as he did in the land and damage list attached to his report, a certain sum for damages, viz., \$35. It was not, as I have shewn, for the engineer or the Court of Revision to assess or limit the damages, nor could the former bind the owner by his estimate. He might well, therefore, seeing that the damages were independent of the assessment for benefit, be content not to appeal against the latter assured that his rights in respect of the former were not affected.

The next question is whether the plaintiff's claim, which seems to be in all respects a meritorious and just one, fails by reason of any defect in the procedure adopted by him to enforce it. Whether he commences his proceedings by way of action, as he did here, or by way of reference to the arbitration and award of the referee under section 93 of the Act of 1894, seems now to be a matter of little or no importance: *Ellice v. Hiles* (1894), 23 S. C. R. 429, 435, 437.

Judgment.

OSLER,
J.A.

I think the notice served on the defendants on the 10th of February, 1897, was reasonably sufficient within section 93, sub-section 2, although the claim for damage by severance is not specially referred to. It states generally that the claim is for damages sustained by reason of the enlargement and construction of the drain through the claimant's property. There is no reason to suppose that the defendants were in any way misled by it, and it was given within one year from the time the cause of complaint arose, as required by sub-section 3 of section 93. The objection chiefly relied on by the defendants is that it was not also filed within that time with the clerk of the County Court of the county in which the lands in question are situate as required by that sub-section. As to this I entirely agree with the learned referee that the provisions of the sub-section are directory only and that we cannot infer therefrom that the owner's right to compensation was intended by the Legislature to be dependent or conditional upon an exact performance of its requirements. There are no negative words nor any expressions which indicate that the act if not done till a later time would be invalid, such for example as are to be found in secs. 606 and 608 of the Municipal Act, R. S. O. ch. 223, relating to the liability of the corporation for accidents arising from the non-repair of highways; or in sec. 9 of the Workmen's Compensation for Injuries Act, R. S. O. ch. 160. The object of the enactment seems to be to facilitate the township in ascertaining what claims are being made against them, and where, as in this case, the action is brought within a few weeks after service of the notice and well within a year from the time the cause of complaint arose, the filing of the notice pending the litigation seems to be a matter of but trivial importance.

The authorities referred to in the finding of the referee fully support his conclusions on this part of the case.

I would, therefore, dismiss the appeal.

It may be observed that by sec. 9, sub-sec. 3, of the Drainage Act, 1894, the engineer is now expressly required

to provide for the construction or enlargement of farm bridges rendered necessary by the drainage work and to fix the value thereof to be paid to the owners of the land. And by sub-section 5 of the same section the engineer is to determine in his report in what manner the material taken from the drainage work is to be disposed of and the amount to be paid for damage to land and crops occasioned thereby, and is to include these sums in his estimate of the cost of construction. Any one dissatisfied with the report in that respect may appeal to the referee (sub-section 6) who is required to proceed on such appeal in the prescribed manner.

It is somewhat singular that no appeal is given to the referee in respect of the other matters in which the landowner is interested under sub-sections 3 and 4 of the same section.

MACLENNAN, J.A. :—

When the engineer's report, dated the 30th of September, 1892, was made, and when the by-law founded thereon was provisionally adopted by the council on the 24th of October afterwards, the engineer had not, by law, any power to bind landowners, whose lands were to be taken for or injured by the proposed work, by any estimate made by him of value or damage. By section 569 of the Municipal Act of 1892, he was to assess the property to be benefited with its due proportion of benefit, and see also sub-sections 5, 6 and 7. The power to value injury and damage was given for the first time by the Drainage Act of 1894, which went into effect on the 1st of June, in that year. Sub-sections 2 and 3 of section 9 of that Act require him to estimate the cost of bridges required to connect farm lands with highways, or to connect different parts of an owner's land which have been severed by the work; and sub-section 5 requires him similarly to estimate the damages to lands and crops to be occasioned thereby. Sub-section 6 gives an appeal to the landowner

Judgment

OSLER,
J.A.

Judgment. if dissatisfied with his estimate of the land damages, but
MACLENNAN, gives no such appeal in respect of his estimate for bridges.
J.A. The by-law was not finally passed until the 17th of June, 1895, but the engineer's report was not affected by the Act of 1894, because section 114 declares that anything already done under the former Acts was not to be affected. By his report the engineer assessed the plaintiff for benefit \$75, and for outlet \$33.

It is proved that he did not in making these assessments make any allowance for the value of land taken or land damaged, or for the cost of a bridge rendered necessary by severance. In his report he includes a lump sum of \$1,765 for "land and damages as per list," and he says he annexes to his report "a list giving an estimate for compensation for lands taken and damages." That list was not published with, or as part of, the by-law, nor has it been produced in the present proceedings, and the plaintiff denies ever having seen it, or having had any knowledge that it in any way included or affected his land. It is said that the plaintiff's land was set down in the list as damaged to the extent of \$35. The plaintiff did not appeal from the report of the engineer against the assessment. He was probably wise in not doing so, for, putting damage aside, he could hardly have disputed that he was benefited to the extent assessed by the engineer. He might, perhaps, have got the assessment struck out altogether on the ground that his damage for land taken and injured and for severance exceeded the benefit, and he would then have been left to claim compensation under section 93, when the whole subject could be dealt with. It was strongly contended by Mr. Wilson that not having appealed from the report of the engineer, the plaintiff is barred of all further redress, and great reliance was placed on the case of *Ellice v. Hiles* (1894), 23 S. C. R. 429. I do not think that case stands in the plaintiff's way at all, it being proved clearly in the present case, and even expressed upon the report, that the engineer did not make any allowance for damages of any kind to the plaintiff, or any

other landowner, in making his assessment against them. I therefore think the plaintiff's damage was left altogether at large by the report, and that he could pursue the remedy which the Act provides for its recovery. The further question is whether the plaintiff brought his action in time. It is objected that he is barred by sub-sec. 3, sec. 93, of the Act of 1894, which requires notice claiming damages to be filed and served within one year from the time the cause of complaint arose. It is said that the time should be computed from the 17th of June, 1895, when the by-law was finally passed. I do not think so. I think it should be computed from the time when the work was completed, which was the month of July, 1896. A drain such as this is not like a sewer constructed of brick and cement, and does not become the property of the municipality, and the cause of complaint to the landowner arises when the work is complete, and when the municipality has done all it intends to do for his protection. Therefore, the notice served on the 10th of February, 1897, was in time, and I think it was reasonably sufficient in substance. The statute says that the proceedings shall be instituted by the service of such a notice, and then goes on to say that the notice shall be filed and served within one year, etc. The notice having been served within the year, the proceedings were instituted in due time, and although the notice is also required to be filed within a year, the statute does not say that unless that be done the proceedings shall cease to be effectual, or that the claim shall be barred. The Legislature has not said that the claims shall be barred for want of the filing within the time prescribed, and I think the Court ought not to do so. I, therefore, think the learned referee was right in his conclusion on this point as well as upon the other, and I agree in the reasons which he has well expressed in his judgment.

I think that the appeal should be dismissed.

BURTON, C. J. O., and MOSS, J. A., concurred.

Judgment.

MACLENNAN,
J.A.

Appeal dismissed.

R. S. C.

RAINVILLE V. GRAND TRUNK RAILWAY COMPANY.

Railways—Fire—Negligence—Cutting Down Weeds.

A railway company is responsible for damages caused by fire which is started by sparks from one of their engines, in dead grass and shrubs allowed by them to accumulate in the usual course of nature from year to year on their land adjoining the railway track. It is the company's duty in such a case to remove the dangerous accumulation.

Judgment of FERGUSON, J., affirmed.

Statement. THIS was an appeal by the defendants from the judgment of FERGUSON, J.

The action was brought to recover the value of buildings and chattels destroyed by fire, which started, as was alleged, from sparks thrown from an engine of the defendants in dead grass allowed by them to accumulate on their land near their track.

The action was tried at Sandwich on the 15th of March, 1897, before FERGUSON, J., and a jury, when, on the following answers of the jury, judgment was entered in the plaintiffs' favour for \$1,165 and costs.

Was there any negligence on the part of the defendants in the construction or management of the engine? No, except that the master mechanic admits that any engine will emit sparks and cinders.

Did the defendants negligently permit an accumulation of grass or rubbish or both on their road opposite the plaintiffs' place, which in the case of the emission of sparks or cinders would be dangerous? Yes.

Did the fire in question originate from or by reason of a spark or cinder from the engine? Yes.

If so, was the spark or cinder communicated directly by means of a high wind from the engine to the barn or stack of the plaintiffs, or was the communication by way of a spark or cinder falling upon the defendants' land and the fire then running by reason of dry material from the place where the spark or cinder fell to the fence and thence to

the plaintiffs' property? By falling on the company's Statement. premises, then to the plaintiffs' property.

In any case assess the value of the buildings and the value of the chattel property separately? Award to plaintiffs on building \$725; award on chattels \$440, with costs.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 5th of April, 1898.

Osler, Q.C., for the appellants. Taking the findings of the jury as they stand the appellants should be relieved. They have not done any act tending to cause injury, and were under no obligation to guard against the possible danger resulting from natural causes: *Holmes v. Midland R. W. Co.* (1874), 35 U. C. R. 253; *Jaffrey v. Toronto, Grey and Bruce R. W. Co.* (1874), 24 C. P. 271; *McCallum v. Grand Trunk R. W. Co.* (1871), 31 U. C. R. 527. Apart from this there is no evidence to justify the finding that the fire was caused by a spark from an engine; that is mere guess-work. Something more must be shewn than the passing of an engine and the outbreak of fire: *Moxley v. Canada Atlantic R. W. Co.* (1888), 14 A. R. 309, 15 S. C. R. 145; *McGibbon v. Northern R. W. Co.* (1887), 14 A. R. 91; *Senesac v. Central Vermont R. W. Co.* (1896), 26 S. C. R. 641.

M. K. Cowan, for the respondents. Grass and rubbish were cut and left beside the track, and the place was specially dangerous. The fire was undoubtedly caused by sparks thrown from an engine, and the defendants are liable. The authorities are quite clear and undistinguishable.

Osler, Q.C., in reply.

May 10th, 1898. BURTON, C. J. O.:—

The negligence charged was the omission to keep the track clear of inflammable material and to use a locomotive free from defects.

The jury have found that the locomotive was free from

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BURTON,
C.J.O.

defects, and the sole question before us is whether it is actionable negligence on the part of a railway company to leave the natural growth of grass and weeds on their lands adjacent to the track, so that if a fire occurs from a spark or cinder from a locomotive falling upon such grass or weeds and igniting them, it must be regarded as negligence, for the consequences of which they are liable.

It has been held by the Exchequer Chamber in England, in the case of *Smith v. London and South-Western R. W. Co.* (1870), L. R. 6 C. P. 14, that allowing the cuttings and trimmings of grass and hedges to be accumulated and placed in heaps on the right of way adjacent to the track and to remain there for fourteen days in very hot weather was evidence for the jury of actionable negligence, but it is contended here that no act was done by the company causing or contributing to the loss, and that there is no duty cast upon them by statute or otherwise to remove this natural growth of weeds, which would impose upon them a duty in some locations almost impossible to perform.

The law is now well established, that when the Legislature has sanctioned and authorized the use of locomotives to be worked by steam, and steam is used for the purpose for which it is authorized, and every reasonable precaution is observed to prevent injury, the sanction of the Legislature carries with it this consequence that if damage results the company using it is not responsible.

Negligence on the part of the company alone gives a cause of action; but the law very properly requires that the company shall in the exercise of the rights and powers so conferred upon them adopt such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes.

Chief among these is the requirement to use the most approved mechanical contrivances in the construction of their engines, but the exercise of care in the management of their road is by no means confined to this. The case I have referred to of *Smith v. London and South-Western*

R. W. Co., shews that the leaving of dry trimmings in a dry season on the sides of the track furnished evidence from which a jury might find them guilty of actionable negligence, and a remark of Lord Blackburn in the course of his judgment goes far, I think, to sustain the view that the defendants were wanting in proper care in omitting to remove the dry grass and weeds in the present case. After referring to the immunity from damage given to the company unless guilty of some negligence, he proceeds: "That being so, I agree that if they have the land at the edge of the line in their own occupation they ought to take all reasonable care that nothing is suffered to remain there which would increase the danger. Then comes the question, is there evidence enough in this case of the want of that reasonable care?"

Judgment.

BURTON,
C.J.O.

In one case, *Bass v. Chicago, etc., R. W. Co.* (1862), 28 Ill. 9, one Judge gave a long judgment to the effect that the company would be guilty of a want of reasonable care if they neglected to remove such grass and weeds; but it is not, I should mention, the judgment of the full Court, the other members thinking that the question was not properly raised on the record and declining to give any opinion.

In a later case, in which the same learned Judge was in a minority, *Illinois Central R. W. Co. v. Mills* (1866), 42 Ill. 407, the Court, whilst holding that the omission to remove the grass was not *per se* negligence as a conclusion of law, held that it was a question of fact to be determined by the jury, and that they should have been told that the company was bound to the use of reasonable diligence in keeping the land free from them.

The same rule was arrived at in *Ohio, etc., R. W. Co. v. Shanefelt* (1868), 47 Ill. 497, although I do not agree in another point decided in that case, that the landowners contiguous to the railway are as much bound in law to keep their lands free from an accumulation of dry grass and weeds as railway companies are, and that the negligence of the owner in that respect would be available as an answer on the ground of contributory negligence.

Judgment.

BURTON,
C.J.O.

I think that the neglect of the precaution to remove dry grass and weeds is evidence of negligence which may render the company liable, even though all its appliances were proper, and though it were guilty of no negligence in allowing the fire to escape.. This is a duty which is implied in a grant to use engines worked by steam. The removal of such inflammable matter is quite as much a means of preventing the communication of fire from the engines as the use of inventions for preventing the escape of fire from the engines themselves.

I do not think that section 275 of the Railway Act, 51 Vict. ch. 29 (D.), has any application; it was passed *alio intuitu*.

I have come to the conclusion that there is a liability on the part of the company to keep their lands free from these accumulations, and that the appeal should be dismissed.

OSLER, J. A. :—

The jury found that defendants had negligently permitted an accumulation of dead grass or rubbish to be on the banks of their roadway and track allowance opposite the plaintiffs' premises in such a condition as to be dangerous in case of the emission of sparks or cinders from their engines; and that the fire which destroyed the plaintiffs' buildings originated in that way, having been communicated thereto from a fire which first started in the dry grass and rubbish on the defendants' grounds.

The contention of the defendants is that although it might be negligent for them to bring brush, weeds, trimmings or other combustible material upon their property and leave it there, or to pile up and leave about in heaps cuttings of dry grass which had grown there exposed to the danger of taking fire from a passing engine, yet that it is no evidence of negligence that they have simply permitted the natural growth of grass to take place unchecked and to accumulate from year to year, disappearing by the process of natural decay. They also say that there is no

evidence that more than a year's growth or part of a year's growth had been left by them. They further urge that there is no reasonable evidence that the fire had been caused by the escape of sparks from their engine.

As regards the first point: there is nothing in the decided cases which justifies the distinction sought to be drawn between the company's actually depositing or heaping up combustible material on their property, and their merely leaving such material as the natural growth of the soil to accumulate to such an extent and to be in such a condition there as to be dangerous if ignited. There is much in the case of *Vaughan v. Taff Vale R. W. Co.* (1858), 3 H. & N. 743, and in the Exch. Ch. (1860), 5 H. & N. 679, which is opposed to the defendants' contention. There the defendants had allowed the embankments of their railway to be in such a state as to become peculiarly liable to ignite from anything that might fall from an engine, and the second count of the declaration stated a cause of action on that ground. Cockburn, C.J., makes no doubt that defendants would be liable upon such a cause of action if proved, and while a new trial was granted for misdirection in respect of the first count, to which it was thought the parties had confined themselves at the trial, we are told in *Fremantle v. London and North-Western R. W. Co.* (1861), 10 C. B. N. S. 89, that the proceedings were afterwards stayed on payment of the damages and costs, the defendants evidently feeling that it was useless to contest the case further on the second count, the substance of which is stated by Willes, J., in the case just cited.

And in *Smith v. London and South-Western R. W. Co.* (1870), L. R. 5 C. P. 98, and in the Exch. Ch., L. R. 6 C. P. 14, Blackburn, J., says, at p. 22 of the last report: "It is clear that when a railway company is authorized to run engines on their line, and that cannot be done without their emitting sparks, the company are not responsible for injuries arising therefrom unless there is some evidence of negligence on their part. That being so, I agree that if they have

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OSLER,
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J.A.

the land at the edge of the line in their own occupation they ought to take all reasonable care that nothing is suffered to remain there which would increase the danger." One cannot read the two reports of this case without being convinced that in the opinion of the Court it is, in the case of a fire arising from sparks cast by an engine passing along the line, some evidence for the jury of negligence on the part of the railway company that in a dry time, with knowledge of the risk of fire which must be caused thereby, they have left combustible matter alongside of their tracks or within their grounds from which fire, if it caught there from their engines, might spread into adjoining premises. I do not understand how it can make the slightest difference in their responsibility whether they have cut and piled and left the grass and clippings in heaps on their land, or whether they have simply suffered the growth of years to accumulate and form a mass of equally combustible material.

The cause of action, as Wilson, C. J., said in *Holmes v. Midland R. W. Co.* (1874), 35 U. C. R. 253, is the negligence of the company in keeping their grounds in such a state as to be dangerous or which they knew would make them dangerous.

The decision in *Jaffrey v. Toronto, Grey and Bruce R. W. Co.* (1874), 23 C. P. 553; 24 C. P. 271, on motion for a second new trial, which was granted, though without any practical benefit to the defendants, accords with these authorities, though the Court was of opinion that under the circumstances the verdicts were against evidence and weight of evidence, on the fact of negligence. *Flannigan v. Canadian Pacific R. W. Co.* (1888), 17 O. R. 6, may also be noted.

In the case at bar it must be said that there was a considerable body of evidence for the jury that the defendants had left their premises in such a condition as to be dangerous if the combustible material there happened to catch fire from one of their engines.

It was for the jury to say whether under the circum-

stances of difficulty which, according to the defendants' contention, existed in preventing its removal or destruction, they had done all that could reasonably have been expected of them.

Judgment.

OSLER,
J.A.

I do not cite *McCallum v. Grand Trunk R. W. Co.* (1871), 31 U. C. R. 527, in appeal, as the first paragraph of the head note is erroneous. The only point decided was that the six months' limitation applied to such a case as this; nor do I think it necessary to refer to the American cases on the subject, some of which may be found in the 42nd and 47th volumes of the Illinois Reports.

Then was there evidence that the fire had been caused by the defendants, that it came from their engine? There clearly was. No other probable cause was proved, and that a probable cause of that kind existed was proved. An engine was seen by one of the witnesses to pass along the line past the plaintiffs' premises. Before then no fire had been seen, and a fire on the defendants' premises was seen by this witness two or three minutes or less afterwards.

It is only necessary to refer again to *Smith v. London and South-Western R. W. Co.* (1870), L. R. 6 C. P. 14, and to *Piggot v. Eastern Counties R. W. Co.* (1846), 3 C. B. 229.

I hardly understand what is meant in the judgment below where the learned Judge says that it seems to him that proof of where the fire came from may be by circumstantial evidence. I should not have thought this was open to doubt after such cases as the above and *Moxley v. Canada Atlantic R. W. Co.* (1888), 14 A. R. 309; 15 S. C. R. 145. The case of *Senesac v. Central Vermont R. W. Co.* (1896), 26 S. C. R. 641, was cited, but has no bearing. There it was not proved either that the fire was thrown by a defective engine or that the defendants had negligently left combustible material on their premises, which had caught fire there from a well managed and constructed engine, or that they had been negligent in not extinguishing the fire which had arisen on the premises and had extended to the adjoining properties. In short, there was no evidence of negligence.

Judgment.

OSLER,
J.A.

Lastly, there is here evidence which supports the finding of the jury, that the fire first caught in the matted grass, etc., on the banks and sides of the defendants' track, between the track and the fence, and spread from thence into the plaintiffs' grounds.

It is only necessary to add that section 275 of the Railway Act, 51 Vict. ch. 29 (D.), as to cutting down weeds, etc., on the company's lands has no application to an action of this kind.

On the whole it appears to me that there is no reason to interfere with the judgment, and that the appeal must be dismissed.

MACLENNAN, J. A. :—

I am of the same opinion.

MOSS, J. A. :—

I agree that there was evidence proper to be submitted to the jury of negligence on the part of the defendants which caused the injury complained of.

The facts in evidence and the findings of the jury bring this case well within the line of authorities which we are not at liberty to overrule, even if we were so disposed.

I do not think that in upholding the judgment we are at all extending the rules of law in such cases, or imposing upon the defendants any burden that they were not already subject to.

Appeal dismissed.

R. S. C.

DRAKE V. SAULT STE. MARIE PULP AND PAPER COMPANY.

Water and Watercourses—Interference with Navigation—Private Right of Action.

The plaintiff was a fisherman living on a small farm fronting on, and about three miles from the mouth of, a navigable stream flowing into Lake Superior. He was in the habit of using a sail boat to go from his house to the lake and thence to Sault Ste. Marie and other points and was also sometimes employed by neighbours to bring to them in this sail boat supplies and provisions. He also used other boats for fishing purposes. The defendants brought large quantities of timber down the stream and kept it in booms at the mouth so that for the whole summer access to the stream by the boat was cut off:—

Held, that the plaintiff had sufficient special interest to enable him to maintain an action for damages.

Judgment of Rose, J., affirmed.

THIS was an appeal by the defendants from the judgment of ROSE, J. Statement.

The following statement of the facts is taken from the judgment of Moss, J. A.:—

The plaintiff is the owner of and resident upon a small parcel of land in the township of Fenwick, in the district of Algoma, fronting upon the Goulais river, a navigable stream which empties into Goulais bay on the east side of Lake Superior. The defendants are an incorporated company, carrying on the business of manufacturers of paper at Sault Ste. Marie. For the purposes of their business the defendants require large quantities of pulp wood, and the plaintiff complains that during the spring of 1896 the defendants drove large quantities of timber and pulp wood down the Goulais river and boomed it at the mouth, thereby wholly blocking up the main channel for a distance of about two miles from the mouth, and by stretching a boom across the head of two other channels obstructed the entrance to them and covered the whole surface of the river at that point with a jam of timber and pulp wood, with the result that the navigation of the river was wholly blocked and impeded from the beginning of May until the end of October. The plaintiff is a fisherman, and at the time of the obstruction was the owner of a sail-boat of

Statement. about four tons burthen with a draft of three or three and one-half feet when loaded, with which he was accustomed to navigate the river as well as with the boat or boats usually employed by him in his occupation of a fisherman. The plaintiffs' property is situate about three miles, following the windings of the river, from its mouth, and he was accustomed when the river was free to moor his sail-boat near his house. The sail-boat was not generally used in the fishing operations, but was employed when necessary to make trips to Sault Ste. Marie. On these occasions the plaintiff was sometimes engaged by other settlers along the river to bring supplies, furniture, or other purchases made by them at Sault Ste. Marie.

During the jam and consequent obstruction of the river he could not bring up the sail-boat, and it was left in the south channel below the boom, so as to have access to the bay, and he says that this involved his having to send some person or go himself once or twice a week to look after her. If he had occasion to bring anything up the river he would sail the boat up the south channel to the boom stretched across its head. The cargo of the boat would then be carried up the river to where the jam ended, about a quarter of a mile from the head of the channel, and be transferred to another boat, by which it would be conveyed to its destination. He alleges that in consequence of the obstruction he was prevented from carrying on his business as fisherman and from carrying freight on the river, and was injured in his trading business, which was thereby ruined, and was hindered in bringing provisions and household supplies to his dwelling. The statement of claim also contains this allegation (paragraph 8): "The other settlers in the neighbourhood in which the plaintiff resides have suffered damage in common with the plaintiff on account of said obstruction." The claim is for \$500 damages and an injunction against the defendants obstructing the navigation of the river or any of the channels thereof.

The defence sets up first that the plaintiff has not shewn

particular damage by reason of the alleged wrongful acts over and above what is common to others, and next that the timber and pulp wood in question were placed in the river for the purpose of being floated down to Lake Superior, thence to be taken to the defendants' works at Sault Ste. Marie; that the booms were placed at the mouth for the purpose of preventing their escape, and that the defendants used all diligence in removing them, and made only a reasonable use of the river for these purposes. The defendants also set up that during the obstruction they offered to carry free of charge any goods or other articles which the plaintiff might desire to transport up or down the river by teams upon a road which they had constructed to or from a point beyond the obstruction. There was also an objection that the plaintiff's claim, if any, should be determined by arbitration under the Saw Logs Driving Act, but this was withdrawn at the trial.

Statement.

The case was tried at Sault Ste. Marie on the 11th of December, 1896, by ROSE, J., without a jury. It appeared that the plaintiff generally used the south channel in sailing up or down to or from his place. The water is deeper in it, and there is probably better navigation than in the main channel. From the plaintiff's house to the head of the jam was a clear space of water following the windings of the river of about two miles. From the head of the jam to the head of the south channel, where the water was again free and unobstructed, was about a quarter of a mile, and the plaintiff testified that the only inconvenience any person had was this quarter of a mile of the jam. It was the only thing that prevented free access to Lake Superior. He does not appear to have had many freight commissions to do for his neighbours in the year 1895, and in 1896 he did those he was entrusted with. He was inconvenienced and hampered by the obstruction which obliged him to unload and transport to the head of the jam. In this, however, he was assisted by the defendants' teams and men along a road or trail over the lands of the neighbouring proprietors. It does not appear that he was

Statement. obliged to or did refuse any freight commissions, or that he was compelled to expend money for help or otherwise that he would not have done but for the obstruction. He did not apply for a fisherman's license for 1896 because, as he stated, of the obstruction, but he admitted that he had previously stated to several persons that he did not intend to do any more fishing himself, and it appeared that he had lost a great part of his nets in the fall of 1895. If he had fished he could have taken the fish up to the head of the south channel, and from there carried them to the head of the jam, but he made no effort to fish during the year.

At the trial the defendants seem to have relied chiefly upon their claim to a right to obstruct the stream as they had done founded upon the extent of their business operations and the benefit accruing from them to the settlers and public generally, and they insisted that the use made by them of the stream was reasonable under the circumstances.

The learned trial Judge determined against these contentions. He held that the obstruction was not reasonable; that R. S. O. (1887), ch. 120, did not authorize such user, which was in substance an obstruction of the river and entire prevention of navigation during the whole season; that under the common law they were not justified in completely obstructing the navigation; that they were guilty of a wrong, and that the plaintiff was entitled to damages.

He considered the plaintiff had exaggerated the extent of his damages, and that he was acting liberally by him in assessing them at \$100.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 31st of March, 1898.

Wallace Nesbitt, for the appellants. The appellants have, under R. S. O. (1887), ch. 120 and ch. 121, a statutory right to bring logs down a stream of this kind, and having

exercised the right reasonably and without negligence an Argument.
 action will not lie: *Langstaff v. McRae* (1892), 22 O. R. 78
 They are bound to do only what ordinary prudent business
 management requires: *Harrison v. Southwark and*
Vauxhall Water Co., [1891] 2 Ch. at p. 414. At any
 rate the plaintiff has not suffered special injury and cannot
 sue: *Fritz v. Hobson* (1880), 14 Ch. D. 542.

A. C. Macdonell, for the respondent. The plaintiff has
 been prevented from carrying on his usual occupation, and
 has thus sustained special injury. The defendants have
 no statutory rights except during freshets: *Caldwell v.*
McLaren (1884), 9 App. Cas. 392; *Crandell v. Mooney*
 (1873), 23 C. P. 212; and they have used the river for
 storing logs as well as floating them, and are not protected.
 The plaintiff's common law right is clear: Angell on
 Watercourses, 7th ed., sec. 555; Coulson and Forbes' Law
 of Waters, pp. 72, 96. In *Langstaff v. McRae* (1892), 22
 O. R. 78, there was no interference with navigation.

Wallace Nesbitt, in reply.

May 10th, 1898. OSLER, J.A.:—

I have carefully examined the provisions of the two
 Acts upon which the defendants relied as their justification
 for what is complained of in this action, and think it only
 necessary to say that I find nothing in either of them
 which supports their contention. The Acts are, in the pre-
 sent Revised Statutes, ch. 142, commonly called "The Rivers
 and Streams Act," and ch. 143, "The Saw Logs Driving
 Act." Section 3 of the latter Act is the clause chiefly relied
 upon, but it expressly provides that persons putting logs into
 the stream shall make adequate provision to break jams
 of such logs and clear the same from the banks and shores
 with reasonable dispatch and run and drive the same so as
 not to unnecessarily obstruct the floating of other logs or
 the navigation of the water. What the defendants have
 done is to treat the stream as if it were their own private
 property and to use it for the whole season for their own

Judgment. business to the exclusion of every body else. I think the finding of the learned Judge that they had made an unreasonable use of the stream is well supported by the evidence. I refer to *Crandell v. Mooney* (1873), 23 C. P. 212, and to the passage cited in the judgment of Galt, J., from *Davis v. Winslow* (1863), 51 Me. at p. 297.

OSLER,
J.A.

The question, however, whether the plaintiff can be said to have suffered damage peculiar to himself beyond that suffered by the rest of the public who were also entitled to use the river for any purpose has to be considered. It is not easy to reconcile all the cases which have been decided on this subject, that is as to what is sufficient to cause that special damage which entitles a person in the position of this plaintiff to maintain an action. Had the obstruction in the river occurred *ex adverso* his premises and thereby prevented his access to and from the river or rendered it less convenient than it otherwise would be, the case would have presented no difficulty. Here, however, the waterway of the river is open to and from the riparian land, and the obstruction occurs at some little distance from the latter, though it is quite as effectual to interrupt the plaintiff's substantial user of the river as a means of access to and from his land and to and from the larger and more extensive highway into which the river leads as if the access to the actual frontage of the land had been interrupted. Nevertheless, the plaintiff's user of the river has been, in fact, from time to time actually obstructed, with the result that he has been compelled to unload his vessel when coming up the river on arriving at the point where the obstruction commenced, and then to portage or carry his goods overland until he could enter the river again at the point where it ended and ship them again into another vessel. This appears to me enough to constitute that damage peculiar to the plaintiff beyond that suffered by the rest of the lieges which entitles him to maintain the action within the principle of such cases as *Rose v. Miles* (1815), 4 M. & S. 101, and *Crandell v. Mooney*, (1873), 23 C. P. 212; and it

may perhaps also be sustained on the principle suggested in the judgment of the Privy Council in the case of *Bell v. Quebec* (1879), 5 App. Cas. 84, 100, the access to and from the plaintiff's frontage being for most practical purposes substantially interrupted by the obstruction, though it occurs, in fact, at some distance therefrom. I refer also to *Chamberlain v. West End, etc., R. W. Co.* (1862), 2 B. & S. 605; *Caledonian R. W. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259; *Fritz v. Hobson* (1880), 14 Ch. D. 542.

Judgment.

OSLER,
J.A.

The case of *Langstaff v. McRae*, (1892) 22 O. R. 78, was relied on by the defendants as shewing that they would not be liable in the absence of negligence. It is, however, an altogether different case from the present. There the construction of the boom, the very thing which caused the damage, was made lawful by statute and no negligence was shewn, though the result of it unfortunately was to overflow the plaintiff's land; therefore no action lay. Here, when the obstruction of the river by the logs ceased to be reasonable it ceased to be lawful, and therefore under the circumstances of special damage the action does lie.

For these reasons I am of opinion that the appeal should be dismissed.

Moss, J.A.:—

I agree with the view of the defendants' position under the common law and the statutes taken by the learned trial Judge.

But to my mind the most formidable objection to the plaintiff's right to maintain the action is that presented by the first paragraph of the statement of defence, viz., that the plaintiff has not sustained particular damage.

It is to be observed that the obstruction in the stream was not in front of or opposite to the plaintiff's property, and did not therefore interfere with his immediate access to and from it to the water. His rights as a riparian proprietor in that respect were not touched. He was able to take boat from his own land and to proceed by it a

Judgment.
Moss,
J.A.

long distance down the stream before he encountered the obstruction. In these respects his case is different from the class of cases of which *Rose v. Groves* (1843), 5 Man. & Gr. 613, and *Lyon v. Fishmongers Co.* (1876), 1 App. Cas. 662, are examples. The river is a highway, and as regards obstructions there appears to be no distinction between it and a highway on land. And it is well settled that an obstruction in front of one's own premises, preventing or interfering with one's access to or from the highway, gives a special or peculiar right of action.

Nor does this case fall exactly within the class represented by *Rose v. Miles* (1815), 4 M. & S. 101, where the plaintiff while proceeding with his barges laden with goods along a public navigable creek encountered a barge moored across the stream by the defendant, which obstructed the navigation and prevented the plaintiff from proceeding with his laden barges, and he was compelled to convey his goods a great distance over land and incurred expense in their carriage. It was there held that the plaintiff was in occupation, so to speak, of the navigation. He had commenced his course upon it, and was in the act of using it when he was obstructed. It did not rest merely in contemplation.

The decision in *Crandell v. Mooney* (1873), 23 U. C. C. P. 212, proceeds, I think, upon the principle of *Rose v. Miles*, for it appears from the report that although the plaintiff made claim for obstructions on a number of days, Richards, C.J., who tried the case, confined the claim to the 7th of September, on which day the defendant placed a boom across the river, and thereby prevented the plaintiff's steamer on her return from her daily trip to Lindsay from reaching her wharf, and allowed damages for that day's detention only.

The plaintiff has not shewn any depreciation or diminution of the value of his property by reason of the obstruction, such as indicated in *Small v. Grand Trunk R. W. Co.* (1857), 15 U. C. R. 283.

Upon the facts it seems to be brought down to the cases sug-

gested in the judgment in *Bell v. Quebec* (1879), 5 App. Cas., at p. 100, where the following language is used : " Whether an obstruction amounts to an interference with the access to the frontage would be a question of fact to be determined by the circumstances of each particular case. When this access is not interrupted, and the waterway of the river is open to the riparian land, the question will arise for decision whether the right of action of the riparian proprietor for a distant obstruction in the river can be based on higher or other ground than would be that of any one of the public using the river and sustaining special damage ; though his being such proprietor would obviously be an important element in the question whether such damage had in fact been sustained."

Judgment.

Moss,
J.A.

This language of the judgment, which was delivered by Sir Montague E. Smith, who had been engaged as counsel in some of the leading cases on this branch of the law, seems to indicate that their Lordships were of opinion that the case of an obstruction which, while it left open to a riparian proprietor his access to the waterway, cut off or materially interfered with his use and enjoyment of it as a highway, was one in which peculiar damage might be more readily sustained and easily shewn, than by one not a riparian proprietor.

Whether in such case the plaintiff, being a riparian proprietor, must shew that he has sustained some damage peculiar to himself, his trade or calling, or whether interference with his full enjoyment of his property, apart from mere personal inconvenience, will suffice, is left undecided.

In *Swanson v. Mississippi and Rum River Boom Co.* (1890), 42 Minn. 532 the plaintiffs were the owners of two tracts of land on the Mississippi river, distant about thirty-five miles from each other. They used the lower tract as a yard for the manufacture of brick, and upon the other they had stored fire wood for use at the brickyard. The charge against the defendants was that they had wrongfully interfered with and obstructed the channel of the river by driving piles therein, fastening booms, and

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J.A.

detaining large quantities of logs therein, "thereby absolutely preventing the navigation of the river between the plaintiffs' two tracts of land." The plaintiffs alleged that they had large quantities of wood stored on the upper tract which they contemplated transporting to their brickyard below, but were prevented from doing so by these obstructions to navigation and were compelled to leave it in the upper tract for over a year, whereby it became injured and deteriorated. They further alleged that by these obstructions they were prevented from transporting a lot of wood by river from the upper to the lower tract, and were compelled to take it out of the river at a point where they were not owners of the shore and were compelled to pay the riparian proprietor the sum of \$50 for the privilege of doing so.

The Supreme Court of the State held that these facts constituted no cause of action—that they simply shewed that the defendants had committed a public nuisance by obstructing a public highway, which deprived the plaintiffs of the cheapest and most convenient route to their brickyard.

It appears to me that, according to English authority, the plaintiffs did make out a case of damage peculiar to themselves, their trade or calling: *Winterbottom v. Derby* (1867), L. R. 2 Exch. 316, *per Kelly*, C. B., at p. 322. Many of the cases are noted in vol. 16 of the American and English Encyclopædia of Law, at p. 972, under the head of Nuisances.

The Minnesota Court note that it was not shewn that the defendants had cut off all access to the plaintiffs' property.

Here, upon the evidence, it seems that not only is the river a highway to the plaintiff's premises, but it is the only highway, just as has been said in regard to some English rivers in early days, that "In some parts * * rivers were not only highways, but they were the only highways (just as the Irrawady is the only highway in Burmah at the present day), *e.g.*, in 1372, we are told that the Avon between Bath and Bristol was the only highway

by which victuals could be brought, there being no land passage, *par obstacle de marreys*. 2 Rot. Parl. 312."*

Judgment.

Moss,
J.A.

At all events, during the season of navigation it is the main travelled way, much more convenient, easy of access, and pleasant to traverse, than any other way from the plaintiff's house to the waters of Lake Superior, over which lies his course to Sault Ste. Marie and other points of traffic or trade.

The cutting off for a large part of the year of this convenient and almost necessary mode of access to and from the lake cannot but be a serious inconvenience and damage to a resident riparian proprietor. He is hampered and hindered not merely in the prosecution of his business, but in the transport of provisions and supplies for use in and about his household, and is driven to troublesome shifts for overcoming the difficulty.

The injury inflicted is as great for the time, though not as permanent in its character, as the plaintiffs were threatened with in *Spencer v. London and Birmingham R. W. Co.* (1836), 8 Sim. 193, and *Cook v. Mayor, etc., of Bath* (1868), L. R. 6 Eq. 177. These were cases of highways on land, but in *Attorney-General v. Earl of Lonsdale* (1868), L. R. 7 Eq. 377, a case of obstruction, though not complete obstruction, of the navigation of a stream, they were applied and followed.

It is injury very similar in character to that for which compensation is allowed under the Land Clauses Acts and the Railway Clauses Acts, where an obstruction to the highway giving the most convenient access to and from land has been created.

I think the plaintiff has shewn special injury not common in kind to the whole public, and that the damages awarded are reasonable under the circumstances.

BURTON, C.J.O., and MACLENNAN, J.A., concurred.

Appeal dismissed.

R. S. C.

*Extract from Opinion of Counsel as to Public Rights in Rivers on a case submitted by the corporation of Nottingham, March 30th, 1887.

WARD V. WILBUR.

Lien—Vendor's Lien—Performance of Agreement.

In the absence of agreement or circumstances operating to the contrary a vendor's lien arises whenever land is conveyed in consideration of acts to be done by the grantee ; the right is not limited to cases of conveyance for a money consideration.

Where, therefore, upon the partition of a piece of land held by tenants in common, one grantee, as part of the consideration for his grant, covenanted to obtain for the other tenants in common a release of the contingent interest of two persons in the land conveyed to them, it was held that a lien attached upon the portion conveyed to him for the due performance of this covenant.

Judgment of ROBERTSON, J., affirmed.

Statement. THIS was an appeal by the defendants from the judgment of ROBERTSON, J.

The action was brought to reform an agreement for partition and the deeds executed in pursuance thereof, and for a declaration of a right to lien and in it were involved several questions as to the construction of wills under which the parties obtained title to the land in question.

The agreement in question contained a provision that the defendant Mrs. Wilbur would pay to her two children legacies payable to them and charged upon the land, and would procure from them upon their attaining their majority, deeds of quit claim to the plaintiff of certain contingent interests in the part of the land allotted to the plaintiff, and the chief contest was as to the extent and effect of a further provision that the plaintiff should have a charge upon the part of the land allotted to the defendant Mrs. Wilbur. The land had, before action, been conveyed by Mrs. Wilbur to the defendants the Greens. The action was tried at St. Thomas, on the 29th of April, 1897, before ROBERTSON, J., who on the 28th of May, 1897, gave judgment in the plaintiff's favour.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 2nd and 3rd of February, 1898.

W. E. Gundy, for the appellants, the Greens.

J. M. Glenn, for the appellants, the Wilburs.

J. A. Robinson, for the respondent.

Judgment

MACLENNAN,
J.A.

May 10th, 1898. MACLENNAN, J.A. :—

[The learned Judge stated the facts and discussed the evidence, and came to the conclusion that the deed in question did not in terms give a lien for the performance of the agreement to procure the deeds of quit claim.]

But the further question arises, whether there is not a lien upon the undivided share of the land conveyed by the plaintiff to Mrs. Wilbur for the procurement of the quit claims, on the ground that her agreement to procure them was part of the consideration. A vendor's lien does not depend on the agreement of the parties, and it exists unless there is an agreement or understanding to the contrary, or unless the circumstances of the case are inconsistent with it. It may be enforced where the money has not been paid in fact, notwithstanding an acknowledgment of payment in the body of the conveyance, or endorsed upon it. The cases in England are collected in the last (7th) edition of *W. & T. L. C.*, vol 2, p. 926, under the leading case of *Mackreth v. Symmons*, and see 2 Dart's *V. & P.*, 6th ed., p. 824 *et seq.*, Sugden's *V. & P.*, 14th ed., p. 670. I have examined many of the decided cases and so far as I have been able to discover, either in the text books or the reports, the liens which have been recognized and enforced have been almost without exception for money, which in some form or other was the consideration, or part of it, for the conveyance. The only exception which I have found in the English books is the case of *Richardson v. McCausland* (1817), Beat. 457, before Lord Mannors, Lord Chancellor of Ireland, where a lady, tenant for life of a house and land, conveyed it to her son, the remainderman, in consideration of his paying the rent of another house for her, and supplying her with a sufficient quantity of hay and corn, and her lien not only for the rent of the house but for the supply of hay and corn was established.

Judgment. That case is cited as an authority and without any adverse comment or observation by Lord St. Leonards in a long note on the subject of vendor's liens at p. 676 of the last (14th) edition of his work on Vendors and Purchasers, every line of which, he says in his preface, was written by himself. It was also relied on in *Paine v. Chapman* (1857), 6 Gr. 338, in our own Court of Chancery in 1857, before Esten and Spragge, V-CC., on demurrer, in which it was held that a lien might be declared in a case in which land had been conveyed in consideration of the grantee agreeing to maintain the plaintiff and to provide her with washing, lodging, wearing apparel and other necessities; which was also secured by a bond executed by him for the purpose. The case afterwards came on for trial before the late Chancellor Blake, 7 Gr. 179, who affirmed the decision on demurrer, and added that he thought *Richardson v. McCausland* was expressly in point.

MACLENNAN,
J.A.

It is to be noted also that the present Chief Justice of Canada, Sir Henry Strong, was counsel for the defendants both on the argument of the demurrer, and at the hearing of the cause. I am aware that *Paine v. Chapman*, has been followed in several similar cases, but I have not found that it has ever been considered or referred to in this Court, except in *Mason v. Agricultural Mutual Assurance Association* (1868), 18 C. P. 19, in which, at page 29, it is referred to by Mowat, V-C., as a case which had often been acted upon, even at that early period, and had been acquiesced in. An English case of *Matthew v. Bowler* (1847), 6 Ha. 110, is referred to by Spragge, V-C., in *Paine v. Chapman*, but it does not afford much, if any, assistance. The consideration in that case for a sale of leasehold property was a payment of fifteen shillings per week for life, the vendee covenanting that he would pay that, and also the ground rent, that he would insure against fire, keep the premises in repair, and otherwise perform the covenants in the head-lease and indemnify the vendor in respect thereof. The prayer of the bill, however, is stated to have been only to establish a lien for

the weekly payments past and future and to recover the amount of the rents. Sir James Ingram decided that the plaintiff was entitled to the lien claimed by her bill, remarking that the purpose of the covenants to uphold the property could scarcely be understood unless the property was intended to constitute a security. In *Mackreth v. Symmons* (1808), 1 W. & T. L. C., 6th ed., at p. 363, Lord Eldon says, the principle "goes upon this, that a person having got the estate of another, shall not, as between them, keep it, and not pay the consideration." Now that principle is as applicable to Mrs. Wilbur's agreement to procure the quit claims as to the money she was to pay for owelty or the legacies which she agreed to pay to her children, and the lien ought to attach in respect of the one as readily as of the others in the absence of agreement to the contrary. No doubt it is easier to enforce a lien for a plain money demand than one for breach of such a covenant as this but the difficulty is not insuperable. The damages may be ascertained by a reference to the Master, as must have been done in the case in Ireland, and as has been the practice here in cases like *Paine v. Chapman*.

Judgment.
 MACLENNAN,
 J.A.

I am, therefore, of opinion that the plaintiff is entitled to a vendor's lien for the fulfilment of Mrs. Wilbur's agreement to procure quit claims from her children. The judgment has given a lien upon Mrs. Wilbur's whole allotment. But I think that is plainly wrong; it ought to be confined to the undivided share of the land which belonged to the plaintiff, and which passed to Mrs. Wilbur by the partition deed. That makes it necessary to consider what the plaintiff's undivided share in the land was, at and before the execution of the deeds.

[The learned Judge then dealt with the various questions of title.]

Moss, J.A. :—

[The learned Judge stated the facts and discussed the evidence and came to the conclusion that the wording of

Judgment.

Moss,
J.A.

the deed was sufficiently wide to give a lien for the performance of the agreement to procure deeds of quit claim.]

If there had been no agreement whatever for a lien I should have been disposed to think the case was one in which there might exist a vendor's lien for unpaid purchase money. The case may be likened to one of exchange of properties, one of which has an encumbrance upon it which the grantee agrees to pay off. In case of default on his part and his grantor being obliged to pay, the latter would be entitled to a lien as for unpaid purchase money upon the land he had conveyed: *Seney v. Porter* (1866), 12 Gr. 546. Or it may be likened to the case of a conveyance in consideration of the supply of provisions, etc., to the grantor with a bond securing performance. Upon default the grantor would be entitled to have the obligation stand as a lien as for unpaid purchase money: *Paine v. Chapman* (1857), 6 Gr. 338. These liens would be enforceable against the lands in the hands of a purchaser for value if he had notice of the claims, and in this case notice is established.

In the view I have taken it does not seem necessary to reform any of the instruments or to make any reference to the Master to ascertain the amount with which the twenty-five acres is to stand charged.

It will be sufficient to declare the plaintiff entitled to a lien on the twenty-five acres to the extent of \$400 until the defendants have procured and delivered to her quit claim deeds from the two Wilbur children of any interest they may have in the plaintiff's fifty acres.

With these variations the judgment should be affirmed and the appeal dismissed with costs.

BURTON, C.J.O., and OSLER, J.A., concurred with MOSS, J.A.

Appeal dismissed.

R. S. C.

IN RE CURRY, CURRY V. CURRY.

CURRY V. CURRY.

Improvements on Land—Tenants in Common—Allowances—Interest—Practice—Master's Office—Accounts.

A tenant in common who holds possession, manages, and receives the rent of, the common property, which is subject to an encumbrance, is entitled when called on for an account by his co-tenant, to be allowed for advances properly and reasonably made by him, for repairs and improvements, and for principal and interest on the encumbrance, with interest from the time the advances are made.

The mode of taking the account and computing interest discussed.

Judgment of STREET, J., affirmed.

Where accounts are brought into the Master's office by the accounting party, with the vouchers and the usual affidavit of verification, and no notice of objection is given, the accounts are taken to be sufficiently proved.

Judgment of STREET, J., 17 P. R. 379, affirmed.

THESE were appeals from judgments of STREET, J.

Statement.

The first action was brought by John Curry, surviving executor of the estate of the late James R. Curry, for the administration of his estate. The second action was brought by Cora Curry and her mother against John Curry and his brother William George Curry, for an account of their dealings with the estate of their mother, Mrs. Glen. A reference was directed to the Master of the Supreme Court of Judicature for Ontario at Windsor and the accounts were taken by him. Cora Curry and her mother appealed from his reports in respect of six sets of items, and STREET, J., who heard the appeals, gave judgment in their favour upon one point and affirmed the reports in other respects. His judgment is reported in part in 17 P. R. 379. He decided that interest should be allowed upon advances properly made, and as to the mode of computing it proceeded as follows:—

The manner in which the Master has taken the account is also challenged. It is argued that it was improper to take it with "rests" at all, and that the proper mode of taking the account, if interest were allowed at all, was to have calculated interest upon each sum paid out from the

Statement. time it was paid until the present time and have added the total sum thus arrived at for interest to the total sums paid out, as constituting one side of the account, and then to have calculated interest upon each sum received from the date of its receipt to the present time and to have added the total sums thus arrived at for interest to the total sums received, as constituting the other side of the account. It was said that any other mode of taking the account would be to allow compound interest.

The proper method of taking an account of this kind in cases of loans and the reasons for not taking it in the way contended for by the defendants here are clearly pointed out by the late Sir John Beverley Robinson, C.J., in *McGregor v. Gaulin* (1848), 4 U. C. R. 378. It is there held that a creditor is entitled to treat payments made on account of a loan as going first in reduction of overdue interest and it is pointed out, that in a long account where payments made do not exceed the interest due at the time they are made the method contended for by the defendants here would result in the wiping out of the principal. Take for instance a loan made in July, 1877, of \$1,000 at 10 % and three payments of sums equal to the accrued interest say of \$500 each made in July, 1882, July, 1887, and July, 1892; the result would be that under the mode of calculation urged by the defendants the whole debt, both principal and interest, would be wiped out in July, 1897, as the following account shews:

1877.

July, To principal advanced	\$1,000
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1897.

July, To 20 years int. at 10%	\$2,000
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\$3,000

1882.

July, By payment 5 yrs. int. at 10%	\$500
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By int. to July, 1897, on it (15 yrs.) ..	750
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1887.

July, By payment 5 yrs. int. at 10%	500
---	-----

By int. to July, 1897, on it (10 yrs.) ..	500
---	-----

1892.

Statement.

July, By payment 5 yrs. int. at 10%	500	
By int. to July, 1897, on it (5 yrs.)	250	
		————— \$3000

On the other hand by treating the sums paid as applied in payment of the interest due at the time they were paid, which is held to be the proper method, the account would shew the whole principal unpaid with interest from July, 1892, without any compound interest being charged. This question also was raised in *Menzies v. Ridley* (1851), 2 Gr. 544, and the method of calculation laid down as correct in the case of loans of money in *McGregor v. Gaulin* (1848), 4 U. C. R. 378, was adopted as the proper method to apply to the case of an executor who has made advances out of his own pocket upon which he is allowed interest: see page 551 of the report of that case.

Compound interest is not to be allowed, and to make my meaning clear I will point out that where a payment is made and a balance is struck it is improper to treat the whole balance as principal unless the payment made is sufficient to satisfy all the interest charged to the date of the payment; so that a balance should not be struck for the purpose of recommencing the computation of interest until payments have been received sufficient to extinguish the interest to date. As the Master is said to have taken this account with half-yearly rests at the rate of 7 per cent. the account must be referred back to him to be taken upon the basis I have indicated, and in taking it, the rests should be made at intervals of not less than a year.

Cora Curry and her mother then appealed to this Court, and John Curry and William George Curry also appealed, as to the point decided adversely to them, and the appeals were argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 9th of November, 1897, and the five following juridical days.

Statement. *McCarthy*, Q.C., and *O. E. Fleming*, for Cora Curry, et al.
S. H. Blake, Q.C., and *R. Sutherland*, for John Curry,
et al.

Many of the points in question are not of general interest. The facts and arguments upon the points which are of general interest are stated in the portions of the judgments now reported.

May 10th, 1898. BURTON, C.J.O.:—

In this unfortunate litigation there are no less than five appeals by Cora Curry and her mother against the Master's report which have been exhaustively dealt with by my learned brother Street in his very able judgment. His judgment in all the five cases was brought by appeal to this Court and occupied several days in the argument.

I agree with my learned brothers that in each of these five cases the appeals should be dismissed and I cannot profitably add to the reasons given by them in coming to that conclusion beyond this that in two at least of the cases the questions should have been raised and disposed of in the Master's office and not having been raised should not now be given effect to. It is obvious I think that the points now raised were not thought of or intended to be raised then and that their now being taken was an after-thought, and the objections being without merits ought not to be given effect to unless we are compelled to do so.

[The learned Chief Justice then dealt with the appeal of John Curry and came to the conclusion that it also should be dismissed.]

OSLER, J.A.:—

I also am of opinion that these appeals should be dismissed. I have had some hesitation in coming to this conclusion in regard to the appeal on the question of interest, but on the whole I do not see my way to differ from the conclusion arrived at by the other members of the Court.

MACLENNAN, J.A. :—

Judgment.

MACLENNAN,
J.A.

On the 1st of January, 1887, Emma Glen died intestate, being the owner of the land and buildings in the town of Windsor called the Curry block, consisting of stores and offices. Mrs. Glen was a widow who had been twice married, and she left her surviving two sons, the defendants John and William G. Curry, and the plaintiff Cora Curry, the only child of a deceased son, James Curry. At Mrs. Glen's death the Curry block was subject to a mortgage made by her to the London and Canadian Loan Company on the 24th of August, 1877, on which \$7,000 was overdue bearing interest at 8 per cent. per annum. At Mrs. Glen's death Cora Curry was an infant and she only attained her majority in 1895. In his mother's lifetime the defendant John acted as her agent with respect to the Curry block, and upon her death he continued his management and collected the rents, paid taxes, kept down the interest on the mortgage, and by the month of August, 1895, had reduced the principal debt to \$3,500. During the same period the defendant John had also made considerable substantial repairs upon the property which he paid for out of the rents which he had received. No personal representative of Mrs. Glen's estate had ever been appointed, and on the 16th of January, 1896, a judgment was pronounced in the present action declaring "that the defendant John should, as executor *de son tort* of the estate of the late Emma Glen, account as hereinafter directed for this purpose and for the final winding-up of the estate of the said Emma Glen; that all necessary enquiries be made and accounts taken, costs taxed, and proceedings had for the administration and final winding-up of the personal and real estate of the said Emma Glen, and for the adjustment of the rights of all parties interested therein, by the Master of this Court at the city of Windsor." The judgment further ordered "that all balances which might be found due from the defendants or either of them to the said estate shall be forthwith, after

Judgment. the same shall have been ascertained as aforesaid, paid
MACLENNAN, into Court to the credit of this action subject to the
J.A. further order of the Court." In pursuance of this judgment John Curry brought into the Master's office an account of the rents of the Curry block received by him from the death of Mrs. Glen to the date of the judgment, and also an account of his disbursements made by him during the same period for repairs of the buildings, painting, glazing, papering, plastering, etc., also for payments on account of principal and interest upon the mortgage made by Mrs. Glen, and for insurance premiums as required by the terms of the mortgage. This account was proceeded with before the Master, in the presence of the plaintiffs' solicitor, without any objection as to its being within the terms of the reference, and also without any objection to the defendant John Curry's right to be allowed for repairs or improvements as against the rents which he had received, and those items were duly vouched to the satisfaction of the plaintiffs' solicitor and of the Master and were allowed. The Master's report is dated the 10th of November, 1896, and finds that the rents received by John Curry from the death of his mother to the 6th of February, 1896, amounted to the sum of \$20,634.41 and that he was entitled to be allowed the sum of \$16,331.14, leaving a balance to be accounted for of \$4,303.27. The plaintiff appealed from this finding of the Master on the 25th of November, 1896, on the ground that there was no evidence to support it in respect of about 160 items "expended in permanent improvements" and which should be disallowed. The appeal came on to be heard before Street, J., when the appellant asked for leave to object to the report on the further ground that the expenditure for repairs and improvements was not made on account of the intestate's estate, and was made without the privity or authority of the plaintiff as a tenant in common of the Curry block. The learned Judge did not in terms either grant or refuse the leave thus asked, but he dismissed the appeal on the merits, holding that, having regard to the

statement of claim and the terms of the judgment, and to what had passed in the Master's office, and to the law of the case, the allowance of the items objected to was proper. It is this decision of my brother Street which is the subject of the first appeal by the plaintiff Cora Curry.

Judgment.

MACLENNAN,
J.A.

The same objections were urged before us as before Mr. Justice Street. The objection that the rent account was not within the reference is not I think tenable. No doubt upon Mrs. Glen's death the land descended to her heirs and was no longer her estate, but the judgment expressly authorizes the administration and final winding-up of her real estate as well as of her personal estate, meaning of course the real and personal estate which had been hers at her death. The Curry block was subject to a large mortgage made by the intestate, and it was quite competent for the parties to require it to be sold by the Master for the payment of the debt. By statute the land was the primary fund for its payment, but that is only so as between the persons entitled to the land and those entitled to the personalty. The general personal estate was not discharged, and the intestate's personal estate could not be fully administered and finally wound up without payment of her debts including the mortgage. But even if the land and the rents collected therefrom were not strictly within the reference, it was too late to take that objection after the account had been brought in and proceeded with, and vouched and reported upon by the Master, in the presence of all parties interested and without any objection, and, as pointed out by Mr. Justice Street, the statement of claim asks for this very account, and the judgment must therefore have been intended to grant what was so asked for.

For the purpose of deciding the appeal on its merits it is necessary to have regard to all the circumstances. The plaintiff, and the defendants John and William, became tenants in common of the land in equal shares at Mrs. Glen's death, and it was encumbered by a mortgage for \$7,000 with interest at eight per cent., with a covenant for insurance, and it was overdue. The mortgage having

Judgment.
MACLENNAN,
J.A. been made by the intestate every part of the debt was a charge upon the whole estate, and there was no right of redemption of an undivided share: *Waugh v. Land* (1815), Geo. Cooper 130; *Wynne v. Styant* (1847), 2 Ph. at p. 306; *Harper v. Godsell* (1870), L. R. 5 Q. B. 422. Some rents had accrued and were still unpaid at the death, and there was an overdrawn account of the intestate at the bank. The defendant John continued to collect the rents as he had been doing before, and after paying the overdraft at the bank, almost the first thing he did was to pay the sum of \$255 for interest and \$500 on account of principal money upon the mortgage. He paid the interest regularly afterwards, half-yearly, and also the annual premium of insurance required by the mortgage deed, and at different times made further payments on account of principal money so that when the account was taken he had kept down the interest and had reduced the mortgage debt to \$3,500. He also out of the rents paid the taxes and made the repairs and improvements upon the buildings, the expenditure upon which is the subject of this appeal. I have looked at the items objected to and find they include nine payments of insurance and two payments of interest on the mortgage and the other items may all without much difficulty be described as ordinary repairs. They are for painting, papering, glazing, plastering, and other like charges incidental to the ownership of house property. Of the 164 items the only one which could be said not to be an ordinary repair, is a charge for plate glass amounting to \$129. The largest item of any kind is \$249 for lumber. There are only two items over \$200, and only three others exceeding \$100. There were as many as sixteen different tenants, perhaps more, at Mrs. Glen's death. The annual rents received at that time were about \$1,600, and during the last year about double that sum, an average of \$2,380 per annum for nearly nine years.

On these facts there are several grounds on which I am clearly of opinion that the judgment ought to be main-

tained and the appeal dismissed. The claim to be allowed for the repairs and improvements in question is most just in itself. It is proved that they were made in order to retain tenants who would probably have gone out unless they were made, and that the effect was not only to retain the tenants, but to obtain increased rent. When, therefore, the objection to their allowance was not made before the Master, nor even taken on the original notice of appeal against his report, and when the learned Judge did not in terms grant the motion to amend the notice of appeal, I do not think we should be promoting the very right and justice of the case by allowing such an amendment now.

Judgment.

 MACLENNAN,
 J.A.

There are, however, other grounds on which the appeal must be dismissed. As I have pointed out, the mortgage made by Mrs. Glen was overdue when she died, and very soon afterwards John paid \$755 on account of principal and interest, paid the interest regularly afterwards, and reduced the principal money from \$7,000 to \$3,500. The whole land was a security for every part of the mortgage debt, and every payment he made gave him a charge upon the plaintiff's undivided share of the land for her share of the payment, and he became in equity a mortgagee in possession of the plaintiff's share: see *Pelly v. Bascombe* (1863), 4 Gif. at p. 395. It makes no difference that he had no conveyance and had not the legal estate. A second mortgagee never has the legal estate. That being his position he could do all those things in the way of repairs and improvements which a legal mortgagee in possession could do, and became entitled to charge the expense in his mortgage account. The present account, so far as the payments on the mortgage are concerned, is an ordinary mortgage account, and it is clear that nothing has been allowed which a mortgagee in possession could not properly claim: *Godfrey v. Watson* (1747), 3 Atk. 517; *Sandon v. Hooper* (1843), 6 Beav. 246; *Powell v. Trotter* (1861), 1 Dr. & Sm. 388; *Shepard v. Jones* (1882), 21 Ch. D. 469; *Henderson v. Astwood*, [1894] A. C. at p. 163; Coote's Law of Mortgages, 5th ed., pp. 814, 1199.

Judgment.

MACLENNAN,
J.A.

But I am also of opinion that even if there had been no mortgage the allowances objected to were proper. The case of *Leigh v. Dickeson* (1884), 15 Q. B. D. 60, in the Court of Appeal, was very much pressed upon us as a decision in favour of the plaintiff. So far from being in favour of the plaintiff I think it is against her. That was not, like the present, an action by one tenant in common against another who had received more than his share of the rents, but an action against a co-tenant in actual occupation, who had rented the plaintiff's share, and was holding over, and the defendant sought by counterclaim or set-off to recover from the plaintiff a proportion of his expenditure for repairs, and the decision was that he could not do so, and that the only way in which he could get any allowance therefor was in an action for partition. It has never been disputed that in partition a co-tenant, who has made repairs or improvements, which have increased the value of the estate, is entitled to an allowance for that increase, and the same principle is applicable to an account of rents, which is also a species of partition, that is, a partition or division of the fruits of the land when one has received more than his share. By 4 Anne ch. 16, sec. 27, an action of account was given against the executors and administrators of every guardian, bailiff and receiver, and also by one joint tenant and tenant in common, his executors and administrators "against the other as bailiff for receiving more than comes to his just share or proportion, and against the executor or administrator of such joint tenant or tenant in common," and it was enacted that "the auditors appointed by the Court to administer oaths and examine the parties touching the account are to be remunerated for their trouble by the party on whose side the balance of the account shall appear to be." The decisions under this statute may be found collected in 1 Fisher's C. L. Dig., col. 25, but the action was found inconvenient in practice, and in *Sturton v. Richardson* (1844), 13 M. & W. 17, Alderson, B., said that for that reason it had long been discontinued, and parties had gone into equity

in preference. There can be no doubt that there was, independently of the statute, a similar remedy in equity, and it is inconceivable that a Court of Equity would deny to a co-tenant, accounting for the rents which he has received, his proper and reasonable charges, expenses and other outlay. *Leigh v. Dickeson* (1884), 15 Q. B. D. 60, was an action for use and occupation, and the statute of Anne is not even alluded to in the Court of Appeal by any of the learned Judges. At p. 67, Cotton, L. J., states the principle on which repairs and improvements are allowed. He says: "Therefore, no remedy exists for money expended in repairs by one tenant in common, so long as the property is enjoyed in common; but in a suit for a partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value." The Lord Justice is dealing with a case of repairs and improvements made by a tenant in actual occupation, where no rents have been received out of which to pay for repairs and improvements, and he says there is no remedy except by a partition suit. He is not dealing with a case like the present at all. In England, until 31 & 32 Vict. ch. 40, there was no power in a partition suit to order a sale of the land, either at law or in equity. But in equity the interests of all parties could be adjusted, with an account of rents and profits, repairs and improvements, and the Court would, if necessary, in order to do justice, allot the part of the land on which he had made improve-

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MACLENNAN,
J.A.

Judgment. ments to the tenant who had made them, and could direct
 MACLENNAN, a sum to be paid for owelty: Story's Equity Jurisprudence,
 J.A. 13th ed., secs. 654, 655, 656 (b), 658; 2 Comyn's Dig. 2 A. 1,
 p. 494, and 3 V. 6, p. 674. See also the following cases in
 which such an account has been directed: *Hill v. Fulbrook*
 (1822), Jac. 574; *Lorimer v. Lorimer* (1820), 5 Mad 363;
 Hyde v. Hindly (1794), 2 Cox 408; *Turner v. Morgan*
 (1803), 8 Ves. at p. 145; *Pascoe v. Swan* (1859), 27 Beav.
 508; *Swan v. Swan* (1819), 8 Pri. 518; *Lyne v. Lyne*
 (1856), 8 D. M. & G. 553-559; *Gibbons v. Snape* (1863), 1
 DeG. J. & S. 621, 623, 627; and *Teasdale v. Sanderson*
 (1864), 33 Beav. 534, where Lord Romilly expressed the
 opinion that wherever a tenant in common was charged
 with an occupation rent he should be allowed for repairs
 and lasting improvements. See also Seton on Decrees,
 4th ed., 1006, for forms of references as to rents and
 profits with allowances for repairs and improvements, and
 also *ibid.*, p. 1018; see also Story's Equity Jurisprudence,
 13th ed., secs. 466, 505. I have not found any case
 under the statute of Anne in which it can be seen that
 repairs and improvements were allowed to the defendant
 as against rents received by him, but I have no doubt that
 is what ought to be done upon the very language of the
 Act. He is to account as bailiff for receiving more than
 his just share. A bailiff accounting would be allowed for
 repairs and reasonable permanent improvements as a
 matter of course, and justice calls for such allowances in
 favour of a joint tenant quite as much as in the case of
 agents, trustees and mortgagees. Unless I misunderstood
 Mr. McCarthy he admitted that if the plaintiff were suing
 her uncle as a stranger; who had entered upon the estate
 of an infant, as in *Thomas v. Thomas* (1855), 2 K. & J. 79,
 it could not be disputed that he would be entitled to the
 expenditure in question; for he contended that she was
 not suing him as guardian or bailiff, but as a co-tenant
 accountable by force of the statute of Anne. I think,
 however, there is and can be no difference in the rights of
 the parties, whether the defendant be regarded as a bailiff

or guardian or as a mere co-tenant. What would be just and equitable in the one case must be equally just and equitable in the other.

Judgment.
MACLENNAN,
J.A.

I am, therefore, clearly of opinion that the first appeal of the plaintiff must be dismissed.

Another appeal is in respect of the account of the rents of the International Hotel. The testator, James R. Curry, bought it in February, 1876, for \$14,500, subject to a mortgage for \$11,000, the purchase being a joint one on behalf of himself and Alexander Cameron. On the 3rd of June, 1876, he conveyed it to Cameron and Emma Glen, the conveyance to the latter being by way of security. On the 13th of June, 1877, it was sold under power of sale in a previous mortgage, and bought by, and conveyed by the mortgagee to, Cameron, who on the same day conveyed, by an absolute deed, an undivided half to Emma Glen. It is conceded that Emma Glen held this undivided moiety in trust for the testator, but by way of security for advances. By the testator's will his brothers, William and the respondent John, became entitled between them to one one-eighth share of this property as tenant in common with Cameron, who owned an undivided half, and the plaintiff Cora, who by the will became entitled to three-eighths, and the whole was subject to a mortgage or mortgages to one Richards for \$11,000, bearing interest at 7 per cent. per annum. Upon the testator's death John assumed the management of the property, which consisted of a hotel and stores and offices, in the town of Windsor. He attended to the letting, the collection of the rents, payment of taxes, water rates, repairs and improvements, and also interest on the mortgages, and insurance. In this action he is accounting to his niece Cora in respect of her share of the rents as tenant in common with him under the testator's will, of which he is also the executor. The account extends from the 7th of July, 1877, when the testator died, to February, 1896, and the amount of rents received during these nearly nineteen years as found by the Master is \$57,164.53, and the disbursements during

Judgment. the same period allowed by him in his report are \$55,-
MACLENNAN, 129.54. Of this sum, items amounting to \$10,650 are the
J.A. subject of the present appeal. The objection is that the
items being for permanent improvements made by the
plaintiff, they were made without authority, and cannot
be charged against Cora's share of the rents. The total
of the items objected to on appeal in the Court below as
being for permanent improvements was \$14, 937.97. The
aggregate amount challenged before us was the smaller
sum above mentioned.

My learned brother Street dismissed the appeal on the ground that *prima facie* proof had been made in the Master's office, and that no objection to the allowance or to the sufficiency of the proof had been made until the report was being settled, and he cited several English cases in support of his conclusion. I think those cases are not, in all respects, applicable to our practice, but they put in a strong light the importance and necessity of an accounting party having notice of objections which he is expected to meet, in time to enable him to do so. In the present case the plaintiff brought in his account verified by his affidavit according to the practice, Rule 63, on the 10th of February, 1896. Afterwards, on the 16th of March, the appellants filed a surcharge and falsification of the accounts, composed of nine schedules. The falsification specified three classes of items objected to, upwards of sixty in number, being items for interest, rent of a passage way and payments of taxes, but none of the items of expenditure for repairs and improvements is to be found therein. The Master then appears to have proceeded according to Rules 68 and 69, with a view of ascertaining what was admitted and what was contested between the parties, for on the 29th of April, an admission in writing was signed by the appellants, to the effect that they admitted all the items of disbursements, except about 120, which were specified by number, and as to which it was said that the admission had reference only to the payment out of the sums represented by each number and no further.

This admission implies that not only had the items so admitted been verified by the plaintiff's oath, but had also been vouched in the usual way, by proper receipts shewing to whom, and for what the various sums had been paid. The admission was filed on the 2nd of May, and the plaintiff then immediately proceeded to vouch the items not included therein and which were disputed. The plaintiff was then examined for many days during the month of May, and until the 6th of June, when a further surcharge was filed by the defendants, in which they claim the benefit of a piece of land lying adjacent to the hotel property, which had been purchased by the plaintiff and Alexander Cameron in 1886, on the ground that it was necessary and indispensable as part and parcel of the hotel property and had been acquired for that reason. This surcharge was ultimately disallowed, but further witnesses were examined on the 8th of June, and the evidence was then declared to be closed, and the case stood for argument to a day to be subsequently named. The argument was commenced in July and was continued for many days, when the hearing was closed as provided in Rule 77. The report was then prepared by the Master, and was settled and signed on the 10th of November. Now from first to last in the proceedings before the Master, neither in the falsification filed, nor during the examination of the plaintiff or any of the other witnesses, nor during the argument, nor at any time, until the settling of the report, was the objection which is now relied upon made, nor so far as appears was any further reference made to the saving clause in the admission of the 29th of April, until the Master was settling his report. It will be observed that the saving clause applies to all the disbursement items of the account, upwards of 1,000 in number, besides the 120 enumerated; and, therefore, unless distinctly brought forward, no one could divine what, if any, objection was held in reserve.

Judgment.

MACLENNAN,
J.A.

Now, Rule 77 provides that after the hearing is completed, and the fact entered in the Master's book, no fur-

Judgment. ther evidence is to be received, or proceedings had, without the special permission of the Master, and he may proceed to prepare his report, etc. Again rule 78 provides that parties are to raise before the Master, in respect of any matters presented in his office for his decision, all points which may afterwards be raised upon appeal. What the appellants did was to wait until the hearing was over and the Master was settling his report, before making any objection, and even then so far as appears the present objection was not distinctly made, but only that some items for repairs or improvements had not been proved. I therefore agree with the judgment of my brother Street, that the appeal should be dismissed on the ground that the objection was not taken before the Master, and that in the absence of objection, the items were sufficiently proven. I also agree with him that the case is not one for opening up the hearing.

But I am also of opinion that the report is right on the merits. In his elaborate argument before us Mr. McCarthy did not for a moment suggest that the improvements in question were not made with prudence and judgment, or were not advantageous to the property. If they were not it was for the appellants to prove it. Looking at the rent account it is evident that not only was the value of the property itself enhanced by the improvements in question, but that a largely increased rental was obtained thereby. Then the plaintiff was not only an executor, with authority to withhold the property from sale and to rent it, but he was himself entitled to an undivided one-eighth interest in it. Not only so but the property was under mortgage which he had a right to pay off in his own personal interest, and on which he paid interest to the extent of about \$16,000 in all, and in respect of which he had a lien on the undivided shares of the other parties, both on the estate and on the rents, for reimbursement of their respective proportions, and besides, on the 4th of December, 1883, in order to obtain an extension of time and reduced interest on the Richards

mortgages, he obtained from Emma Glen a conveyance of the undivided moiety held by her, and gave his bond to the mortgagee for payment of the debt, and thereby became a surety for the whole. I think he was in effect a mortgagee in possession from the first payment he made of interest on the mortgage; and he was unquestionably so from the time he became a surety for the whole debt. The authorities which I have cited in my judgment in the Curry block case are applicable here, and shew that the expenditure in question was such as the plaintiff was justified, as against the defendant Cora, in making, and that it was properly allowed.

Judgment.
MACLENNAN,
J.A.

This appeal, therefore, ought in my opinion to be dismissed.

Cora Curry and her mother have also appealed in respect of interest allowed to the plaintiff by the Master in taking the account, and the mode of its computation, both in relation to the International hotel, and the estate account generally. For the greatest part of the period over which the accounts extend the plaintiff was largely in advance, and the learned Judge has allowed him interest at the rate of six per cent. upon his annual balances, but not so as to allow interest upon interest, his receipts year by year being applied upon interest.

On the argument before Mr. Justice Street the right of the plaintiff to interest upon sums advanced by him to pay principal and interest upon mortgages, and other debts and liabilities of the testator, and upon taxes and water rates, was not disputed; and those items constitute a very large part of the disbursements. The principal contention was that no interest ought to have been allowed upon expenditures for repairs and permanent improvements of real estate. We were referred to a very large number of authorities both in the reasons of appeal and upon the argument before us. I have carefully examined all these, and I am of opinion that the appellants have not succeeded in shewing that the judgment is wrong. The accounts extend over a period of eighteen years, and consist of nearly

Judgment. 3,000 items relating chiefly to various parcels of land owned by the testator, or in which he had an interest, or which had been held by him, or by him and others, by way of security. The plaintiff has been charged with the rents and profits and other sums received by him during all those years, and the accounts shew that during the greatest part of the time he was largely in advance to the estate. By the will the plaintiff was a trustee for sale of the testator's real estate, but he had power, if deemed more advantageous for the estate, to retain any part of it, and to let the same until sold. He was also himself entitled under the will to a one-eighth share of the residue for his own use and benefit. The lands were all either heavily mortgaged, or subject to large sums due for purchase money, and I think it is very plain that but for the plaintiff's advances the whole estate would have been lost. Under these circumstances it seems to be only the simplest justice that the plaintiff should have interest, and that it should be allowed to him in the yearly balances as ordered by my brother Street. I think the case of *Menzies v. Ridley* (1851), 2 Gr. 544, lays down the rule, which has been recognized ever since in our Court of Chancery, a period of nearly half a century. The reasons for the rule are also there expressed with great force and clearness. The English case of *Finch v. Pescott* (1874), L. R. 17 Eq. 554, also cited by my learned brother, is a very clear decision of the point in a case like the present. But there is still higher authority, not only for the allowance of interest, but also for its allowance on the yearly balances. In *York Building Co. v. Mackenzie* (1795), 8 Bro. P. C. 42, in an account of rents and profits against a solicitor, whose purchase of an estate was set aside on the ground that owing to his relation to some of the parties interested he was disqualified from purchasing for his own benefit, he was allowed his expenditure for lasting improvements with interest thereon, with such rests as might be just: see the decree of the House of Lords, at pp. 70 and 71, reversing a judgment of the Scotch Court. This case is

referred to with approval in *Mill v. Hill* (1852), 3 H. L. C. Judgment. 828, at p. 869, another case of the allowance of expenditure for lasting improvements. See also a reference to the same case by Lord Eldon in *Ex parte Hughes* (1802), 6 Ves. at p. 624. *Small v. Wing* (1730), 5 Bro. P. C. 66, was a case of an executor who had paid liabilities of the estate with his own money, or money which he had borrowed, and Lord Chancellor Macclesfield allowed him interest thereon, commending what he had done; and on appeal to the House of Lords his judgment was approved: see pp. 72 and 74.

MACLENNAN,
J.A.

The only exception from the rule which has been called to our attention, or which I have found, is the case of costs of actions either brought or defended by an executor and which, being awarded against him, he has paid out of his own money. It is said in two cases, *Lewis v. Lewis* (1850), 13 Beav. 82, and *Gordon v. Trail* (1820), 8 Pri. 416, to be a rule not to allow interest on such payments, when the payments themselves are allowed against the estate. Like my brother Street, I am unable to see on what principle the exception rests; unless it be the gratuitous character of the executor's services. In such cases the executor is personally liable for the costs, and has no alternative but to pay, whether he has funds of the estate in hand or not. I should have thought such a case one strongly calling for the allowance of interest, on the general principle that a trustee is entitled to be indemnified in respect of all his proper acts in relation to his trust. It is, however, unnecessary to consider further that exception from the general rule, for the present case does not fall within it.

I think that in the present case interest has been properly allowed, and properly computed on the annual balances, and that the appeal should be dismissed.

[The learned Judge then discussed the other points involved and came to the conclusion that the appeal of John Curry should be allowed and all the other appeals dismissed.]

Judgment. MOSS, J.A. :—

Moss,
J.A.

The accounts and enquiries did not in my opinion exceed the scope of the judgment, and the defendants being required to account for the rents and profits of the real estate received by them, the question of the allowance of the expenditure for lasting repairs and permanent improvements was properly open upon taking the account. And I agree that the allowances made were properly made.

The case of *Leigh v. Dickeson* (1883), 12 Q. B. D. 194 and (1884), 15 Q. B. D. 60, which was so strongly pressed upon us, is quite distinguishable. It is one of a well-known class of cases in which the rule has been laid down that as between the co-owners of property, if one expends upon it more than the receipts which come to his hands, he has no recourse to his co-owner for contribution. It is clear from the judgment of Pollock, B., after the trial, at p. 195, that he was not treating the defendant as a tenant in common accounting to his co-tenant for rents and profits. He says: "The occupation by the defendant, which occurred after the expiration of the lease in question on the 6th of January, 1881, must be referred, not to his right as tenant in common, but to his continuing in occupation as tenant at sufferance." Dealing with the defendant's counterclaim as upon a demurrer he treats it as a demand for contribution in respect of moneys expended out of pocket, not as a demand arising where the co-tenant has been in possession and in receipt of rents and profits and is accounting either under the statute of Anne or in equity (see p. 199). And at p. 200 he remarks upon the inconvenience of taking an account between the co-tenants whenever one has paid more than his share. In the Court of Appeal the matter was treated throughout as one of demand made by one co-tenant against another for contribution in respect of expenditure out of pocket.

There is a broad distinction between the cases of a co-tenant in actual sole occupation of the premises and one in receipt of the whole rents and profits. In the former

there is ordinarily no claim by the co-tenant not in occupation against his co-tenant in occupation, for occupation rent, but if the latter on partition seeks an allowance for expenditure for substantial repairs and lasting improvements he must submit to be charged with an occupation rent: *Teasdale v. Sanderson* (1864), 33 Beav. 534; *Rice v. George* (1873), 20 Gr. 221.

Judgment.

Moss,
J.A.

But where one of the co-tenants is accounting for rents and profits actually received it has always been the course of the Court to allow him for expenditure made in substantial repairs and lasting improvements. And in *In re Jones, Farrington v. Forrester*, [1893] 2 Ch., at pp. 477-8, North, J., discussing *Teasdale v. Sanderson*, says: "I do not read it as being a decision that you could only have an allowance for repairs where there has been an occupation rent."

I am unable in this case to see how the plaintiff Cora Curry can treat the defendants as co-tenants with her to the extent of exacting from them an account of rents and profits actually received, without on the other hand allowing them for the expenditures properly made for repairs and lasting improvements.

I think all parties intended that the accounts should be taken upon that footing and that the Master rightly dealt with the case in his office. I agree with the conclusions arrived at by my brother Street, and am of opinion that his judgment should be affirmed.

[The learned Judge then dealt with the other appeals and came to the same conclusion in respect to them as MACLENNAN, J.A., except as to the John Curry appeal, which he thought should be dismissed.]

*Appeals dismissed, MACLENNAN, J.A., dissenting
as to John Curry's appeal.*

R. S. C.

MCMILLAN V. MUNRO.

Registry Law—Priorities—Mortgage for Balance of Purchase Money—Estoppel.

The plaintiff agreed to sell a parcel of land, one-half of the purchase money to be paid in cash and the other half to be secured by a mortgage thereon. A deed and mortgage were prepared and executed, the cash payment made, and the deed delivered to the purchaser, the mortgage being delivered to the vendor's agent to be registered. The purchaser had obtained a loan of the cash payment from the defendant upon the security of a first mortgage to be given upon the land in question and this mortgage was prepared, executed and delivered before the execution and delivery of the deed and was registered before the deed to the purchaser and before the mortgage to the plaintiff. Upon receiving the deed the purchaser handed it to the defendant's agent, who then registered it, the plaintiff's mortgage having in the meantime been also registered. The plaintiff and the defendant acted in good faith and each without knowledge or notice of the other's mortgage:—

Held, that the Registry Act did not apply; that the defendant's mortgage was valid only by estoppel and was fed by estoppel to the extent only of the interest taken by the purchaser under the deed; that that interest was subject to the right of the plaintiff to have a legal mortgage for the balance of purchase money, and that the plaintiff's mortgage was therefore entitled to priority.

Nevitt v. McMurray (1886), 14 A. R. 126, applied.

Judgment of ROSE, J., reversed.

Statement.

THIS was an appeal by the plaintiff from the judgment of ROSE, J.

The following statement of the facts is taken from the judgment of MACLENNAN, J. A.:—

The plaintiff was the owner of a parcel of land and dwelling house in the village of Alexandria. She agreed with the defendant Mrs. McIntosh for a sale of the property to her for \$600, \$300 to be paid in cash, and the remainder in two yearly instalments with interest, to be secured by a mortgage thereon. The agreement was verbal, and when the parties met, on the 24th of October, 1895, in the office of a conveyancer to carry it out, payment was agreed to be made in three instalments instead of two. A deed and mortgage were then prepared and executed, and \$300 of the purchase money were paid, the mortgage being for the remaining \$300 payable with interest in three annual instalments. The conveyance was

then delivered to, and taken away by Mrs. McIntosh, and the mortgage was retained by the conveyancer on behalf of the plaintiff for registration. The registry office was closed before the business was completed, and the mortgage was not registered until the following day; that mortgage constitutes the plaintiff's title. The title of the defendant Miss Munro arose as follows: On the 22nd of October, Mrs. McIntosh applied to Miss Munro for a loan of \$300, saying she had agreed or was about to buy the property in question from the plaintiff for \$600; that she had only \$300 of her own, and wanted to borrow the remainder to complete the transaction. Miss Munro agreed to lend the money upon a mortgage of the property intended to be bought. Her brother, a solicitor, went to the registry office on her behalf, searched the plaintiff's title, and finding it satisfactory, prepared a mortgage of the plaintiff's property to his client, and had it executed by Mrs. McIntosh on that day. On the 24th, Miss Munro advanced the money to Mrs. McIntosh, and received the mortgage. Mrs. McIntosh having received the money took it with her and went to the office of the conveyancer, and there carried out the purchase with the plaintiff, as already mentioned. Now, in these transactions, the plaintiff was wholly ignorant that Mrs. McIntosh had borrowed the money, which she paid down, or had executed a mortgage therefor to Miss Munro; and on the other hand, Miss Munro and her brother were ignorant that the bargain between the plaintiff and Mrs. McIntosh was that a mortgage was to be given back for part of the purchase money. Both parties acted honestly and in good faith.

On the following day, the 25th of October, Miss Munro's mortgage was registered at 11.30 a.m., the plaintiff's mortgage at 12.15 p.m., and the deed from the plaintiff to Miss McIntosh half an hour later, both mortgages being registered before either mortgagee had any notice or knowledge of the mortgage of the other. The deed was taken to the registry office by Mr. Munro on behalf of his sister, he having received it from Mrs. McIntosh, and he learned either on

Statement.

Statement. the same or the following day, of the existence and registration of the plaintiff's mortgage. It seems to be conceded that the plaintiff did not learn of Miss Munro's mortgage for a long time afterwards.

The action was tried at Cornwall on the 22nd of April, 1897, before ROSE, J., who gave judgment in the defendant's favour.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 26th and 27th of January, 1898.

E. H. Tiffany, for the appellant. The defendant's mortgage was good only by way of estoppel, and the doctrine of title by estoppel applies only when the subsequent grant which feeds the covenant is exactly what the previous instrument is based on. Here the subsequent deed and subsequent mortgage were contemporaneous and left only an equity in Mrs. McIntosh, and her previous mortgage was not helped: *United States v. New Orleans R. W. Co.* (1870), 12 Wall. 362; Jones on Mortgages, 5th ed., sec. 158. The case is not within the Registry Act, which is for the benefit of subsequent purchasers: *Kingston Building Society v. Rainsford* (1853), 10 U. C. R. 236; and where the grantor has no title the grantee's position is not helped by the Act: *Beattie v. Mutton* (1868), 14 Gr. 686. The defendant never had the legal estate, and it is a question, therefore, of equities: *Wigle v. Settrington* (1872), 19 Gr. 512; and her equitable rights have been lost by the negligence of her agent, who refrained from making inquiry when a prudent person would have inquired: *Parker v. Whyte* (1863), 1 H. & M. 167; *Totten v. Douglas* (1869), 16 Gr. 243. The plaintiff's lien as unpaid vendor still exists.

[OSLER, J. A., referred to *Nevitt v. McMurray* (1886), 14 A. R. 126.]

A. C. Macdonell, for the respondent. The respondent is a purchaser for value without notice of the appellant's

claim, and is entitled to protection. The appellant is not entitled to priority for unpaid purchase money, because the respondent paid part of the purchase money and as to that payment has an equity equal to that of the appellant, and statutory priority : *Baldwin v. Duignan* (1858), 6 Gr. 595. Argument.

E. H. Tiffany, in reply.

May 10th, 1898. BURTON, C. J. O. :—

This is apparently a case in which, however decided, one of two innocent parties must suffer, but the point on which the case must turn is to my mind concluded by the judgment of this Court in *Nevitt v. McMurray* (1886), 14 A. R. 126.

I am unable to take so charitable a view as that of one of my colleagues as to the conduct of Mrs. McIntosh ; on the contrary, to my mind a very glaring fraud was committed by her ; but there is nothing to shew any knowledge on the part of the defendant Munro.

It is contended on the part of Miss Munro that she took as against Mrs. McIntosh an estate in fee by estoppel, and that that estoppel would be fed by any estate or interest afterwards acquired by her, and that whatever may be the state of the law in England, it is too late to dispute the law here since the decision of the Supreme Court in *Trust and Loan Co. v. Ruttan* (1877), 1 S. C. R. 564.

It was urged on the part of Miss Munro that when the legal estate passed from the plaintiff to Mrs. McIntosh it *eo instanti* fed the estoppel, and made her mortgage complete. It is unnecessary to consider what would have been its effect if the transaction had been as Miss Munro understood it, but, as was decided in *Nevitt v. McMurray*, the deed and mortgage for the purchase money were parts of the same transaction, and the doctrine of estoppel could not be invoked to deprive the plaintiff of her land, which she had parted with only on the understanding and agreement that a mortgage should simultaneously be given to

Judgment.

BURTON,
C.J.O.

secure the purchase money. As a *reductio ad absurdum* assume that the plaintiff had agreed to sell entirely on credit, taking a mortgage for the whole \$600, would it not amount to a travesty of justice if, by executing a deed, she had let in Miss Munro's mortgage?

The question of the effect of the prior registration has given me some trouble, but I have come to the conclusion that it does not assist the defendant.

In the majority of cases it is not very important to enquire whether the title passes immediately on the mortgagor acquiring a title, or whether he is merely estopped as against his previous grantee from asserting title.

The doctrine itself proceeds on the ground that having given a deed of the land with a covenant for title and further assurance the subsequently acquired title enures to the benefit of the grantee.

But what is meant by that is the party thus for the first time acquiring a legal title is merely estopped from using it to the prejudice of the former grantee, nor does the title itself pass at once to the former grantee as the words "feed the estoppel" have been sometimes construed.

Sir Edward Sugden, in his work on Vendors and Purchasers, lays down the doctrine in a Court of Equity thus: (14th ed., p. 745) "If a man sell an estate to which he has no title, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser."

This is quite inconsistent with the idea that the title passes at once to the prior purchaser or mortgagee. There would be no breach of the covenant, and no possibility of successfully appealing to a Court of Equity for a decree to convey the land to the person who has already a title to it.

The mortgage to Miss Munro at the time it was executed passed nothing, and she had full notice and knowledge at the time that Mrs. McIntosh had no title, but expected to acquire one from Mrs. McMillan; a representation was made to her which was false, but it was in her power before parting with her money to ascertain whether it was true or false, and she negligently omitted to do so.

If I am right as to the effect of the transaction she never did acquire any title, and the extent of her right is to obtain a decree for the transfer of any interest remaining in Mrs. McIntosh after her mortgage to the plaintiff, nothing more.

Some of the cases have gone so far as to hold that this is a personal equity only, attaching on the conscience of the party, and not descending with the land, and, therefore, if the vendor do not in his lifetime confirm the title, and the estate descend to the heir-at-law, he will not be bound by his ancestor's contract. Sir Edward Sugden, however, remarks upon this that it deserves great consideration.

I am of opinion, therefore, for these reasons, that the case is not within the registry law, and that we ought to allow the appeal.

OSLER, J.A. :—

The mortgage to the defendant Munro was a completed transaction on its date. She had then advanced the sum purported to be secured by it, giving the valuable consideration therein mentioned.

As things then stood that security, apart from the covenants, was absolutely worthless—was no security at all, inasmuch as her mortgagor had, as she must be taken to have known, no title whatever to the land. It belonged to the plaintiff whose right alone it was to make any disposition of it and upon such terms as she pleased and as she could procure any one to accept.

As against the owner the defendant's mortgage was not an instrument which could be registered with any effect. The owner might thereafter sell to the mortgagor, feeding thereby the estoppel created by the mortgage to the defendant without losing her lien for the purchase money or the security of any mortgage she might take therefor: *Nevitt v. McMurray* (1886), 14 A. R. 126, and this even though she did not register it. Can it make a difference that

Judgment.

BURTON,
C.J.O.

Judgment.
OSLER,
J.A.

the defendant registered her mortgage after the plaintiff had executed the conveyance to the defendant's mortgagor? True it is that this deed operated to feed the estoppel created by the earlier mortgage but only to the extent of the mortgagor's interest and subject to the interest remaining in the vendor. But does the defendant thereby become a subsequent mortgagee, *i.e.*, subsequent to the vendor's mortgage, for valuable consideration without notice, as she would be if the whole transaction of her mortgage had taken place after the execution of the conveyance so as to entitle her by force of section 87 of the Registry Act to gain priority over the vendor's mortgage by first registering her own? I am of opinion that she does not. The 87th section seems to me to contemplate a transaction of sale or mortgage of the land actually and entirely subsequent to the execution of the "instrument affecting the land" mentioned in the first part of the section, which instrument may be postponed by the earlier registration of the former, and not a prior dealing with the land by a person who has no interest in or title to it but which by the operation of the law of estoppel may assume vitality through the deed of the owner made in entire ignorance of its existence and against which nothing in the Registry Act calls upon him to be upon his guard.

MACLENNAN, J.A. :—

I think this case cannot be distinguished from *Nevitt v. McMurray* (1886), 14 A. R. 126, which was not cited to the learned Judge or doubtless he would have followed it. The case was very fully argued before us, and although the case above referred to leaves little to be said, I will venture to express my opinion upon it. With regard to Mrs. McIntosh, I prefer not to think she intended to act dishonestly. On reading her evidence, I receive the impression that she was a simple person, unacquainted with business or the meaning and effect of mortgages, and not able to explain her meaning very clearly. It was

true that she had as she said \$300 of her own, although she had it not then in her possession, it was in the hands of some person who afterwards failed, and it was lost. I think Miss Munro and her brother probably misunderstood what she told them about her own money, and about the terms of her contract of purchase. It is not necessary to decide whether Mrs. McIntosh acted deceitfully or not, for the case does not turn upon anything of that kind.

Judgment.
 MACLENNAN,
 J.A.

The present action is brought in consequence of Miss Munro having commenced proceedings to enforce the power of sale in her mortgage, claiming to be the first mortgagee of the land. She claims title by estoppel, contending that the moment the plaintiff executed the conveyance to Mrs. McIntosh, the title which then passed to the latter fed the estoppel, and constituted her mortgage a legal mortgage. She relies on the line of cases in this Province commencing with *Doe Irvine v. Webster* (1842), 2 U. C. R. 224, and virtually affirmed in *Trust and Loan Co. v. Ruttan* (1877), 1 S. C. R. 564; *McQueen v. The Queen* (1887), 16 S. C. R. at p. 72.

The question is whether the present is governed by those cases to the extent contended. If the bargain had been such as Miss Munro and her brother supposed, and if there had been no mortgage to the plaintiff, but a purchase for cash all paid down, those cases establish that although Mrs. McIntosh had no title when she executed the defendant's mortgage on the 22nd of October, and could therefore convey nothing, yet, because it contained the usual covenants for title, the subsequent acquisition of title, when the plaintiff made the conveyance to her, would have fed the estoppel, as it is usually expressed, the estate would have vested in Miss Munro, and her mortgage title would then have been complete.

My brother Rose has felt himself obliged by the line of decisions to which I have referred to decide this case against the plaintiff and to hold that the defendant Miss Munro's mortgage is entitled to priority. The question is

Judgment.
MACLENNAN,
J.A.

very important, and the decision startling; for it will be observed that the plaintiff was honestly carrying out a sale of her land, such as takes place every day, receiving a down payment of part, and taking a mortgage for the balance of the purchase money, without any reason to suspect that there was anything which might or could interfere with her mortgage as a first charge on the land. On the other hand, Miss Munro and her solicitor knew that Mrs. McIntosh had not, and was not intended to have, any title until she acquired it from the plaintiff, by conveyance and upon payment of the purchase money, of which the \$300 which she, Miss Munro, was lending to her, was to form a part. In other words, Miss Munro did not advance her money upon the faith of a title received, but of one to be acquired at a future time by purchase from the plaintiff. Now, if the judgment be right, it is evident that if, instead of lending \$300 upon mortgage, Miss Munro had bought the land from Mrs. McIntosh and had taken a conveyance, and if in ignorance of that the plaintiff had then sold and conveyed the land to Mrs. McIntosh, taking back a mortgage for purchase money, the result would be that the plaintiff would have lost her land, her mortgage would not even be a charge upon it, and she would have had no remedy for her purchase money but an action against Mrs. McIntosh upon her covenant. That would be robbery by operation of law. It is impossible that a rule intended to redress wrong, and to advance the ends of justice, could be allowed to operate where such injustice as that would be the result. The very reason for the rule must exclude its operation in such a case, and *Cessante ratione cessat et ipsa lex*. As said by Lindley, L.J., in *Onward Building Society v. Smithson*, [1893] 1 Ch. at p. 14: "Estoppel is a rule of evidence which prevents a man from saying what is true." A man who is dealing for value has solemnly declared something to be true which is not true. In the interest of the other party the law holds him to or concludes him, as it is sometimes expressed, by his declaration, will not permit him to say,

with reference to that particular transaction, that what he has so asserted is not true. Being merely a rule of evidence, estoppel does not operate by an actual conveyance of the estate, but merely by preventing the party from saying or proving that the estate did not pass by the first deed. There is a similar rule in equity, as expressed in Sugden on Vendors, 14th ed., p. 556: "Whatever interest the seller himself acquires in the estate subsequently to the conveyance, he will be compelled to convey to the purchaser, so as to make good the conveyance to him;" and at p. 745: "And if a man sell an estate to which he has *no title*, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser." The principle underlying both rules is the same. It is that parties must do what they have agreed, for valuable consideration, to do.

Judgment.
MACLENNAN,
J.A.

The Common Law Courts could not compel parties to execute conveyances, and so they effected the object by a rule of evidence, estopping the party from contradicting his deed, while Courts of Equity compelled him to make good his deed by actually conveying the estate which he had afterwards acquired. Now, inasmuch as no Court of Justice could be supposed to right one man's wrong at the expense of another, who is entirely innocent, and no party to the wrong, the rule at common law no more than the rule in equity will be applied so as to take away an innocent person's estate. I think it is impossible to imagine a greater wrong or injustice than if it should be necessary to hold that the plaintiff, by reason of what has taken place, is no more than second mortgagee of what was her own land, which she honestly sold, taking back a mortgage for part of her purchase money. In *General Finance, etc., Co. v. Liberator, etc., Society* (1878), 10 Ch. D. at p. 24, Jessel, M.R., says: "I see no reason for extending the doctrine. It can have no operation except in the case of third parties who are innocent of fraud and who have become owners for value; and there can be no reason, that I am aware of, for preferring one innocent purchaser for value to another. As against the man himself or persons

Judgment.
MACLENNAN,
J.A.

claiming without value, the purchaser or the mortgagee can recover without any recourse to estoppel at all." That shews that the rule will not be applied at law against innocent persons for value, or in other words, only in the same cases in which a conveyance would be compelled in equity. In the present case when Miss Munro parted with her money and took her mortgage, she knew she had got no title whatever. She knew that Mrs. McIntosh had not yet paid anything for the land, and had not yet obtained a deed. The land still belonged to the plaintiff, except so far as it was affected by the verbal contract of sale, and if anything passed to Miss Munro by the mortgage, it was only the benefit of that contract. On the other hand, the plaintiff gave value for her mortgage. She gave the land for it. She executed the conveyance upon an agreement that it should be immediately reconveyed to her as security, and the moment Mrs. McIntosh obtained the title she took it and held it in trust for the plaintiff during the interval between the conveyance and the mortgage. If she refused to execute the mortgage the Court would compel her to do so. It was her duty and obligation to do so, and just as it would be a clear breach of trust for Mrs. McIntosh to have executed a mortgage to Miss Munro during the interval, otherwise than subject to the plaintiff's right to a legal mortgage, and a breach of trust which the Court would redress, so the Court will not apply the doctrine of estoppel to take away and to destroy the plaintiff's equitable right.

Mr. Tiffany argued that after executing the conveyance the plaintiff had a lien for the unpaid purchase money, but I do not think that is the true way to regard it. The agreement was for a legal mortgage, and that is what the plaintiff was entitled to, and not to a lien; and that made the purchaser a clear trustee during the interval. The defendant claimed the benefit of the Registry Act, but I do not think it affects the matter in any way. It is true her mortgage was registered first, but the mortgage itself passed nothing. It is the deed which gave her whatever

she has got, beyond the benefit of the contract, and that was not registered until after the plaintiff's mortgage; and it is clear that the plaintiff had no notice of any claim by the defendant, until after registration of the plaintiff's mortgage.

Judgment.
MACLENNAN,
J.A.

I am, therefore, of opinion that the appeal must be allowed. There should be a declaration that the plaintiff's mortgage has priority over that of Miss Munro, and she must be restrained from exercising her power of sale otherwise than subject to the mortgage of the plaintiff.

Moss, J. A.:—

In *Nevitt v. McMurray* (1886), 14 A.R. 126, the Court did not deal with the argument, much pressed by the respondent in this case, as to the effect of the Registry Act upon the position of the parties. The circumstances in that case probably did not call for any adjudication upon the point, for the instruments under which the defendants claimed had been registered before the execution of the deed from the owner and vendor to McMurray, the grantor under whom the defendants claimed, and, without re-registration at all events, they could not avail against the conveyance subsequently executed by the owner and vendor and the contemporaneous mortgage by the vendee under which the plaintiff claimed: see *Beattie v. Mutton* (1868), 14 Gr. 686.

The distinction between *Nevitt's* case and this lies in the fact that the mortgage to the defendant Munro, though executed before, was registered after, the execution and delivery of the deed from the plaintiff to the defendant McIntosh. But for that the cases would be on all fours. Does that circumstance enable the defendant Munro to claim to hold the same position as if her mortgage had been executed after the execution of the deed to the defendant McIntosh, and the mortgage to the plaintiff but registered before the registration of the latter?

Judgment.

Moss,
J.A.

After the best consideration which I have been able to give this question I have come to the conclusion that it does not. This view appears to lead to the somewhat startling result that a mortgage prior in point both of date and registration is postponed to one subsequent in these respects.

But it is to be borne in mind that the object of the registry laws is not so much to protect a person claiming under a prior instrument, who can always protect himself by registering promptly, as to protect a person claiming under an instrument executed subsequently to, but registered before, another instrument dealing with the same lands. Apart from the Registry Act the mortgage under which the defendant Munro claims, must stand postponed to the plaintiff's mortgage. Why should effect be given to the prior registration as if the instrument had been executed subsequently to the plaintiff's mortgage? Although it did not at the date of its execution and delivery to the defendant Munro pass all the estate it purported to, yet it took effect as a deed. It was from that time capable of being used as a shield against any adverse claim made to the lands comprised in it by the defendant McIntosh or any volunteer claiming under her, and it was the foundation of a right to compel the defendant McIntosh to convey the estate if and when afterwards acquired.

In taking the mortgage the defendant Munro was not relying upon her mortgagor's title as shewn in the registry office. She cannot claim to have been misled or induced to act upon the faith of what appeared there, and which the production of prior instruments would shew not to be the true state of the title. She is not in a position to complain that as against her the objects of the Registry Act were in any manner evaded. These statutes are said to be meant to afford an effectual remedy against the mischief arising to purchasers for a valuable consideration from the subsequent discovery of secret or concealed charges upon the estate, by requiring that every deed by which any interest

in land or tenement is transferred, or any charge is created thereon, shall be put upon the register under the peril that if it is not found there the subsequent purchaser for a valuable consideration and without notice shall gain the priority over the former conveyance by the earlier registration of his subsequent deed. *Per* Spragge, V.-C., in *Waters v. Shade* (1851), 2 Gr., at pp. 482-3, quoting from *Warburton v. Loveland* (1832), 2 Dow & Cl. 480, in the House of Lords.

This is the object with which the Legislature early enacted the provision which is now sec. 87 of ch. 136 R. S. O. (1897), declaring that as against a subsequent purchaser or mortgagee for valuable consideration without actual notice a prior instrument not registered before the instrument under which the subsequent purchaser or mortgagee claims shall be adjudged fraudulent and void.

The operation of this provision is to render void a prior deed not registered before the registration of a subsequent deed made by the same grantor or those claiming under him as volunteers, and thus to protect against prior instruments persons claiming under subsequent instruments, who having acquired their interests for valuable consideration without actual notice, have registered first.

Here the defendant Munro knew the state of the title when she took her mortgage and must be taken to have been aware that the plaintiff was at liberty to deal with the land as she saw fit.

The defendant Munro could not hope or expect to gain priority over the vendor's title by means of registration of an instrument to which the latter was no party.

It cannot be contended that if it had been registered as soon as executed, it would have cut off the real owner's right to deal with her land by conveying it to a purchaser and taking a mortgage back for the purchase money or some portion of it. If it were so an owner would be obliged, in order to be secure, to make an examination of his title in the registry office before he assumed to dispose of his land and to complete and finally close in the registry office

Judgment.

Moss,
J.A.

Judgment. any transaction involving his taking a mortgage from his
Moss, purchaser. Otherwise he might be cut out by some
J.A. instrument executed by his purchaser before the latter
had acquired any estate or interest in the land.

It is now only by reason of the subsequent transaction between the plaintiff and the defendant McIntosh and the execution of the instruments for effectuating it that the defendant Munro is in a position to assert any real claim to the land in question. I see no reason why she should be permitted to claim that her mortgage should be treated as a subsequent instrument and herself as a subsequent mortgagee in order to give her priority over the plaintiff.

I think that in all the cases referred to in the judgment of the learned trial Judge it will be found that the instrument to which priority was awarded by virtue of its prior registration was subsequent in point of actual execution to the instrument which was held to be postponed. I think the plaintiff is entitled to judgment and that the appeal ought to be allowed.

Appeal allowed.

R. S. C.

WILSON V. LYMAN.

Trade Mark—Trade Name—"Fly Poison Pad."

The plaintiffs sold sheets of paper, saturated with fly poison, under the name of "Wilson's Fly Poison Pad." These words were registered by them as a trade mark and were printed on each sheet. The defendants also manufactured and sold fly paper poison in the form of pads, but printed upon them the words, "Lyman Bros. & Co. Lightning Fly Paper Poison," and upon the packages containing them the additional words, "6 pads in a package" or "3 pads in a package." The evidence shewed that sheets of fly paper poison had become known to the trade as "pads," but failed to shew that it was so identified with the plaintiffs' goods as to deceive the public into the belief that in purchasing pads they were getting the plaintiffs' goods:—

Held, that the word "pads" had become so far *publici juris*, that the defendants, as manufacturers and vendors of fly poison, were entitled to describe as "pads" sheets of paper prepared by them, the general appearance of the sheets being different, and the defendants' name appearing prominently on them.

Judgment of ROSE, J., affirmed.

THIS was an appeal by the plaintiffs, and a cross-appeal by the defendants, from the judgment of ROSE, J. Statement.

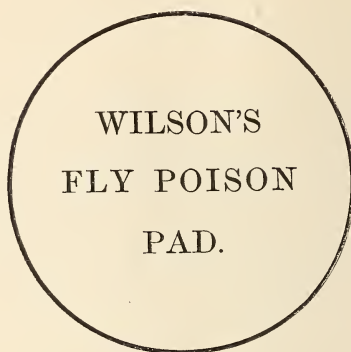
The following statement of the facts is taken from the judgment of MOSS, J.A.

The plaintiffs are manufacturers and wholesale vendors of a compound designed for the destruction of flies and other insects. The plaintiffs' manufacture consists of thick felt paper pads, circular in form, impregnated with the preparation.

For a number of years the pads have, for the purposes of sale, been put up in packages or envelopes and placed in boxes containing either fifty or a hundred envelopes according to the number of pads in the envelope.

In connection with the sale of their fly poison the plaintiffs are the proprietors of a specific trade mark registered under the provisions of the Trade Mark and Designs Act of 1879. As stated in the application for registration it "consists in the words 'Wilson's Fly Poison Pad,' the same being printed on a poison pad, * * the essential feature of the trade mark being the words 'Fly Poison Pad' prefixed with or without the name of 'Wilson,' but prefer-

Statement. ably with it, and so as generally to present the following appearance :



In May, 1896, they commenced this action complaining that the defendants were putting up fly poison in pads similar in appearance to those of the plaintiffs, but octagonal in shape instead of circular, that these pads were being put up in envelopes containing six or three pads with printed directions similar to those on the plaintiffs' envelopes, calling the poison "The Lyman Bros. & Co., Limited, Lightning Fly Paper Poison, 6 pads in a package 10 cents;" that they were being put up in boxes with fifty envelopes of six each and one hundred of three each exactly similar to the plaintiffs' boxes. They further charged that the defendants offered their fly poison for sale as "fly pads," intending to mislead and deceive the public and induce them to believe they were buying the plaintiffs' goods, and with that view had imitated and infringed on the plaintiffs' trade mark, envelopes, and boxes, and the pads manufactured by them.

The defendants denied that they infringed the plaintiffs' trade mark or that they intended to mislead or deceive the public, and submitted that the plaintiffs' trade mark was not the proper subject of a trade mark, the words being only descriptive and not properly registered in accordance with the Act. They further alleged that they had manufactured fly poison for thirty-eight years and

sold it under the name of "Lightning Fly Paper Poison," and were putting it up in pads merely for greater convenience in handling and in compliance with the universal practice of manufacturers of fly poison, and without any reference to the plaintiffs' goods. Statement.

The plaintiffs moved for an injunction immediately after the issue of the writ, and the defendants having expressed their willingness to make certain concessions with regard to the labels on the envelopes and boxes in which their goods were put up, and having undertaken to keep an account, the motion was adjourned to the trial.

At the trial the defendants' counsel offered to continue the concessions and the case was narrowed down to the question whether the plaintiffs were entitled to restrain the defendants from making use of the word "pads" on their envelopes or packages in the manner employed by them.

The plaintiffs make claim to have been the first to put up and sell fly poisons in circular pads, and to put up and sell pads in envelopes and to use envelopes, pads, the labels on them, and the trade mark in Canada and to have acquired a reputation under the name of "fly pads" and that purchasers in asking for "fly pads" mean the plaintiffs' goods.

The defendants still continue to designate their preparation as "Lyman Bros. & Co., Limited, Lightning Fly Paper Poison," but upon their envelopes or packages there are printed the words "6 pads in a package 10 cents," or "3 pads in a package 5 cents," according to the circumstance, and the plaintiffs contend that the defendants are not entitled to so use the word "pads."

The plaintiffs claim the right to restrain the defendants, first, by virtue of their registered trade mark, and second, upon the ground that the word "pad" has become so identified with the plaintiffs' goods that wherever used it would be understood to indicate the plaintiffs' goods and that the defendants by means of its use are enabled to pass off their goods as those of the plaintiffs.

The action was tried at Hamilton on the 25th and 26th

Statement. of January, 1897, before ROSE, J., who on the 23rd of June, 1897, decided that the plaintiffs failed in their endeavour to restrain the use by the defendants of the word "pads" as used.

The plaintiffs appealed from this part of the judgment and urged the same grounds. The defendants also appealed contending that there ought not to have been any relief granted to the plaintiffs.

The appeal and cross-appeal were argued before BURTON, C.J.O., OSLER, MACLENNAN and MOSS, JJ.A., on the 18th and 21st of March, 1898.

S. H. Blake, Q.C., and *J. J. Scott*, for the plaintiffs. The evidence shews that there has been a deliberate attempt on the part of the defendants to take advantage of the reputation acquired by the plaintiffs' goods, and apart from any question of trade mark, the defendants ought to be restrained. There are numerous authorities upon points of the kind now in question but most of these cases are simply illustrations of principles set out in a few leading authorities. *Sykes v. Sykes* (1824), 3 B. & C. 541, is the foundation case for the principle that the possibility of deceiving the unwary purchaser is the test to be applied in deciding as to the question of similarity. *Millington v. Fox* (1838), 3 My. & Cr. 338, and *Seixo v. Provezende* (1866), L. R. 1 Ch. 192, emphasize the doctrine that an intention to deceive is not essential, and *Reddaway v. Banham*, [1896] A. C. 199, shews how liberally the Court will extend protection in a case of this kind. In the "*Yorkshire Relish*" case—*Powell v. Birmingham Vinegar Brewery Co.*, [1894] A. C. 8, the trade mark was held invalid and yet the sale of an article resembling the article in question was restrained: see [1896] 2 Ch. 54; [1897] A. C. 710. See also *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508; *Johnston v. Orr-Ewing* (1882), 7 App. Cas. 219; *Montgomery v. Thompson*, [1891] A. C. 217; *Barsalou v. Darling* (1882), 9 S. C. R. 677; *Partlo v. Todd* (1888), 14 A. R. 444;

17 S. C. R. 196 ; *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. Argument. 893. In *Parsons v. Gillespie*, [1898] A. C. 239, relief was refused under the special facts, the name in question being held to be merely a descriptive one and not one that was used to identify the plaintiffs' goods, but the general principle that even apart from any right to a trade mark any attempt to obtain the benefit of the reputation acquired by another's goods should be restrained is very clearly pointed out.

Thomson, Q.C., and *D. Henderson*, for the defendants. The legal principles applicable to the case are quite clear but the difficulty in the plaintiffs' way is that the evidence does not go far enough to bring the plaintiffs within the authorities cited and relied on. The use of a special name while it may not be an infringement of a trade mark, may yet be strong evidence of an intention to take advantage of the reputation acquired by the goods of a rival trader, but it is necessary to keep in view the distinction between the trade mark right and the right to prevent an attempt to take the benefit of the rival trader's reputation. In the latter case an intention to defraud must be made out. On the facts of this case the plaintiffs are not entitled to any relief.

S. H. Blake, Q.C., in reply.

May 10th, 1898. The judgment of the Court was delivered by

Moss, J.A. :—

Upon the question of infringement of the registered trade mark the point is not whether there has been an infringement of the mark used by the plaintiffs in their business, but whether there has been an infringement of the mark which they have registered. Is the use of the word "pads" in the manner above mentioned an infringement of the plaintiffs' registered trade mark ?

In dealing with this question we are to keep out of

Judgment.

Moss,
J.A.

view the other details of "get up" in the defendants' label for these have been eliminated by the action of the defendants in the concessions made at the trial and by the judgment of the Court.

Since the introduction of the envelope system the words of the plaintiffs' registered trade mark have been printed on the envelopes in prominent type, and in the latest issue, inaugurated in 1891, they appear surmounting a pictorial representation of a lady housekeeper with a gratified expression, engaged in collecting an insect holocaust, these being the most pronounced features of the label.

The defendants do not use the word "pad" upon the article itself, but only on the envelope where it is indicative of the number of pads in the package and the price. Any one handling the pads themselves finds printed on them the words "Lightning Fly Paper Poison," and "Lyman Bros. & Co.," and there is nothing appearing on them to lead to their being taken for those of the plaintiffs.

The plaintiffs' contention is that the defendants in so using the word on their labels have adopted the essential part of the plaintiffs' trade mark, but eliminating the matters abandoned by the defendants and then comparing the plaintiffs' label with the defendants' it does not appear to me that the latter presents in general appearance of lettering or pictorial design any resemblance to the plaintiffs' likely to mislead any one.

In the cases where the plaintiff has obtained an injunction on this ground it is to be seen that the word taken out of the plaintiff's trade mark and used by the defendant in connection with his goods was given great prominence and so brought out in his advertisement or label as to give a character to the rest and attract the attention of the reader or observer. Or it is to be found placed in such a conspicuous connection with the manufactured article itself as to represent in effect that it is the plaintiff's manufacture, or to lead careless or unwary persons into whose hands the document may come to suppose that such is the case.

In *Ford v. Foster* (1872), L. R. 7 Ch. 611, and *Wother-spoon v. Currie* (1872), L. R. 5 H. L. 508, there were circumstances tending to shew a deliberate intent to imitate the plaintiff's trade mark, but so far as they were dealt with on the ground of mere resemblance the ground of decision was the prominent use of the most distinctive word in the plaintiff's trade mark. And so in *Barsalou v. Darling* (1882), 9 S. C. R. 677, and other cases.

Judgment.

Moss,
J.A.

In the case *In re Leonard and Ellis's Trade Mark—Leonard v. Wells* (1884), 26 Ch. D. at p. 300, the Earl of Selborne, L.C., sitting in the Court of Appeal and dealing with a question of this kind, said: "That brings us to the last point which we have to consider. Is this document issued by the defendants a document which, considered on the principles properly applicable to such cases, so uses the word 'valvoline,' which is a prominent part of the plaintiffs' trade mark, as to represent in effect, or to have a tendency to lead careless persons into whose hands the document might come to suppose, that the article is the plaintiffs' manufacture, putting aside the enjoyment which the plaintiffs had of the name by reason of its having been on the register ever since 1878? I think not. The word 'valvoline' is here used clearly not as a trade mark but as a sort of heading, or title, or label, or prominent word descriptive of the article, and the names 'M. Wells & Co., Oil Refiners and Importers,' with their proper address, are placed upon the document with as much prominence as the word 'valvoline,' so that any one looking even casually at the document, and only attending to that which is most conspicuous in it, if he saw the word 'valvoline' would see the words 'M. Wells & Co.'"

I think this language very applicable here. Looking at the plaintiffs' and defendants' labels and judging of the defendants' in the light of the principles laid down in so many cases, I think it may well be said of it that any one looking even casually at it and only attending to that which is most conspicuous, if he saw the word "pads" at all would certainly see the words "Lyman Bros. & Co., Limited, Lightning Fly Paper Poison."

Judgment.

Moss,
J.A.

Then comes the question of "passing off" or in other words, whether the use of the word "pads" as it is used by the defendants in connection with a preparation called fly poison is calculated to mislead the public and induce them to believe that the defendants' manufacture is that of the plaintiffs'?

The learned trial Judge found that the plaintiffs' fly paper became known to the trade as "pads," but he did not expressly decide whether the word had become so identified with the plaintiffs' goods as to have acquired a secondary meaning and to indicate to the public fly poison paper made by the plaintiffs' as distinguished from fly poison paper made by others, nor whether, assuming that to be so, the defendants by the use of the word in the sentence already quoted so describe their fly paper as to mislead purchasers and induce them, notwithstanding the other words, to buy the defendants' goods as and for the plaintiffs'.

Here once more in considering the evidence the general details of the "get up" must be left out. As the case is now presented the defendants are to be regarded as persons having a right to manufacture and vend fly poison and to put the papers or squares in envelopes or packages. As incident to this right they have the right to describe what they are selling but they must not describe them so as to make them pass as the plaintiffs' goods.

They say they are selling packages containing 6 pads for 10 cents and packages containing 3 pads for 5 cents, and in these respects they are stating the actual facts. Is there evidence to shew that this statement leads or is calculated to lead to the impression that the pads so offered for sale are of the plaintiffs' manufacture?

In view of the evidence the plaintiffs cannot contend that they have any exclusive or special right to the manufacture of "pads" in connection with fly poison. Indeed, they do not claim to prevent the defendants from making fly poison pads, and do not dispute that any body may make and vend fly poison pads. Now, when a word is a descriptive word

and descriptive of a thing which any body may make and which any body may sell, the burden is upon the plaintiffs to shew that it is so used by the defendants in their circulars or advertisements as in effect to represent or to have a tendency to make people suppose that the thing advertised or mentioned in the circulars is the manufacture of the plaintiffs: *In re Leonard & Ellis's Trademark—Leonard v. Wells* (1884), 26 Ch. D., at p. 299.

Judgment

Moss,
J.A.

True, a word of this kind may acquire in a trade a secondary signification, but it may also be deprived of the value of the secondary meaning by becoming or being made *publici juris*.

The impression produced upon my mind by the evidence is that the word "pads" did obtain a secondary significance in connection with the plaintiffs' fly poison, but that of late years it has grown to be used in connection with other fly poisons as well, so as to be disassociated to some extent from the plaintiffs' goods and to become in a measure *publici juris*.

There is no evidence that any one has been in fact deceived or misled by the defendants' label. I am aware that this is not strictly essential in all cases, especially those in which the imitation of the plaintiffs' mark is very pronounced and decided. But it is an important circumstance in considering a case like the present, where it is the essence of the plaintiffs' case that the use of the word should be understood in the market to imply that the goods sold or dealt with under it are the plaintiffs' goods: *Parsons v. Gillespie*, [1898] A. C. 239, at p. 246.

That being so I do not think that the plaintiffs have made out a case upon the evidence that the use of the word "pads" in the way it appears on the defendants' envelope in connection with the conspicuous words "Lyman Bros. & Co., Limited, Lightning Fly Paper Poison," is calculated to create the impression in the mind of the public dealing in such commodities that the fly poison contained in the packages is that made by the plaintiffs.

With regard to the defendants' appeal I am not disposed,

Judgment. Moss, J.A. having regard to the offers and concessions made by their counsel before and at the trial, to interfere with the decision of the trial Judge. I am not satisfied that the use of the other details of "get up" in conjunction with the word "pads" did not amount to a combination calculated to mislead. I refer to the observations of Lindley, L.J., in *Lever v. Goodwin* (1887), 36 Ch. D. 1.

I would dismiss both appeals with costs with the right of set-off.

Appeal and cross-appeal dismissed.

R. S. C.

IN RE THE CANADA LIFE ASSURANCE COMPANY AND
THE CITY OF HAMILTON.

Assessment and Taxes—Life Insurance Company—Reserve Fund—Income—Divisible Profits.

The net interest and dividends received by the Canada Life Assurance Company from investments of their reserve fund form part of their taxable income, though to the extent of ninety per cent. thereof divisible, pursuant to the terms of the company's special Act, as profits among participating policy holders and not subject to the control or disposition of the company.

Judgment of the Board of County Judges affirmed.

Statement. THIS was an appeal by the Canada Life Assurance Company from the judgment of SNIDER, HAMILTON and HARDY, Co. JJ., sitting, under the Assessment Act, as a board of appeal from the Court of Revision of the city of Hamilton.

The appellants were a life assurance company and the question was whether interest and dividends received by them from investments of their reserve fund formed part of their taxable income. By the company's special Act, 42 Vict. ch. 71 (D.), participating policy holders were entitled to ninety per cent. of the profits earned by the company, and the interest and dividends in question

formed part of the receipts taken into consideration in Statement. arriving at the sum available for distribution.

The capital of the company was \$125,000, upon which for many years a dividend of twenty per cent. per annum had been paid, with a bonus each fifth year of fifty per cent., and the company's contention was that this bonus should be apportioned, and the taxable income of the company fixed at thirty per cent. of their capital or \$37,500.

The Court of Revision, however, affirmed an assessment of \$692,000 for income, this being the amount of interest and dividends received by the company from investments of their reserve fund.

The board of Judges dismissed the company's appeal from the Court of Revision, SNIDER, Co. J., while concurring in the result, being personally of opinion that apart from authority the proper sum to be assessed would be the interest received for the shareholders on the \$125,000 paid up capital and one-fifth of the whole surplus divided quinquennially between the shareholders and the participating policy holders as so-called profits.

The appeal was argued before OSLER, MACLENNAN, and Moss, JJ.A., on the 25th and 26th of May, 1898.

Bruce, Q.C., for the appellants. The assessable income should be arrived at by adding together the dividend and the bonus, apportioning the latter one-fifth to each year. Everything else goes to the policy holders and is not within the control of the company, which is composed of its shareholders, and what the shareholders get is the income. The company might just as well be assessed for their net receipts from every source as for their receipts from the reserve fund. Part of their general receipts must be reserved for accruing claims, and part of their receipts from the reserve fund must be reserved for the participating policy holders; in each case the want of control by the company and the existence of the statutory liability take the receipts out of the taxable fund. Taxable income is what remains for the person assessed—

Argument. what he can do as he likes with. The case is not governed by *Confederation Life Association v. City of Toronto* (1894), 24 O. R. 643, (1895) 22 A. R. 166, which decided only that the decision of the County Court Judge was, under the Act then in force, final, and *Last v. London Assurance Corporation* (1885), 10 App. Cas. 438, so much relied on, is distinguishable, for that case was decided under the Income Tax Act, which provides a short way of reaching the ultimate beneficiary through the person of the primary recipient.

Robinson, Q.C., and *Mackelcan*, Q.C., for the respondents. If it were not for the Assessment Act and the decisions, the question whether the receipts in question are or are not income would be difficult of solution, but the Act is clear and the decisions not to be brushed aside or distinguished.

All property is subject to taxation unless exempted and it is for the appellants to shew some exempting provision. This they cannot do. Argument as to what is or is not technically "income" is quite beside the point. "Personal property" includes, by the terms of the Act, interest on mortgages, and admittedly the receipts now in question are, to a great extent, interest on mortgages. It has, moreover, been expressly decided that a fund of this kind is assessable: *Confederation Life Association v. City of Toronto* (1894), 24 O. R. 643, (1895) 22 A. R. 166. But apart from the Act and that case this is income. Primarily "income" means "revenue"—everything that comes in—and, admitting that gross revenue is not intended, it is a fallacy to say that the taxable income must be limited to the surplus available for the personal benefit of the person assessed. The sole question is whether these receipts form part of the annual profits, which, according to *Lawless v. Sullivan* (1881), 6 App. Cas. 373, is exactly what "income" for assessment purposes, is, and *Last v. London Assurance Corporation* (1885), 10 App. Cas. 438, is an express authority that they do. The ultimate destination of these profits is of no importance.

Bruce, Q.C., in reply.

June 30th, 1898. OSLER, J. A. :—

Judgment.

OSLER,
J.A.

This is an appeal by the Canada Life Assurance Company under the provisions of the 84th section of the Assessment Act, R. S. O. ch. 224, from the decision of a board of County Judges dismissing the company's appeal from the Court of Revision and confirming their assessment by the corporation of the city of Hamilton for the year 1898 in respect of income.

The amount at which they have been assessed for income is \$692,000, being the interest received for the year 1897 upon the investment of their reserve fund. The appellants contend that this is a sum which will ultimately, in the quinquennial allotments which they are by law bound to make to their participating policy holders, be payable to these, either in cash or by addition to their policies, and, therefore, that it can in no sense be considered part of the taxable income of the company.

In the preamble of the company's special Act, 42 Vict. ch. 71 (D.), 1879, it is stated that the directors have heretofore allotted and divided among the persons "assured upon the participation scale, 75 per cent. of all the profits realized from the entire business of the company, and that in view of the increasing business of the company, it is or may be desirable to vary the relative proportions in which such profits should be allotted and divided as between the shareholders and such persons assured." Then the first section enacts that the directors are authorized in their discretion to make such new allotment and division of such profits among the persons assured on the participation scale and the shareholders of the company at such times and in such manner as they may think fit, and also from time to time to vary the relative proportion in which such profits shall be divided as between such assured and the shareholders: Provided that the proportion of such profits allotted to such assured shall not be less than 90 per cent. thereof and the shareholders' proportion shall not exceed 10 per cent. thereof.

Judgment.

OSLER,
J.A.

The question is whether the proportion of "the profits realized from the entire business of the company," which is thus by law required to be allotted to the participating shareholders is taxable income within the meaning of the Assessment Act.

The relative sections of that Act,—I refer to R.S.O., 1897, ch. 224,—are sec. 2, sub-sec. 8: "'Property' shall include both real and personal property as hereafter defined."

Sub-section 10: "'Personal estate' and 'personal property' shall include all goods, chattels, interest on mortgages, * * * income and all other property, except land and real estate, and real property as above defined, and except property herein expressly exempted."

Section 7: "All property in this Province shall be liable to taxation subject to the following exemptions, that is to say:"—Sub-sec. 18: So much of the personal property of any person as is invested in mortgage upon land, or secured by vendor's lien, or is invested in provincial or municipal debentures. Sub-section 26: Annual income to the amount of \$700, or \$400 if derived from any source other than personal earnings, but in no case more than \$700. Sub-section 27: Rental or other income derived from real estate, except interest on mortgages.

Section 13: Duties of assessors: (1) To prepare an assessment roll in which they are (4) to set down certain particulars in separate columns as follows:

Column 14. Value of personal property other than income.

Column 15. Taxable income.

What that is we see by section 35, subject to the provisions of section 9, which enable a person for the purpose of being placed on the voters' list to refuse exemption on account of income. No person deriving an income from any trade, etc., or other source whatsoever not declared exempt by the Act shall be assessed for a less sum as the amount of his net personal earnings or income during the year then last past, than the excess of such earnings or income over and above the exemptions specified in sub-sec. 26 of sec 7, and

such last year's income in excess of such exempted sums shall be held to be his net personal property unless he has other personal property liable to assessment, in which case such excess of income and other personal property shall be added together and constitute his personal property liable to assessment.

Judgment.

OSLER,
J. A.

The appeal involves the question which has been so frequently considered in recent years of the meaning of the term "income," as used in fiscal legislation, whether municipal or of more extensive scope.

In *Lawless v. Sullivan* (1881), 6 App. Cas. 373, the question was of the assessment of a bank, and arose upon the 15th section of the city of St. John Assessment Act of 1859, by which a tax for municipal purposes was imposed in respect of the "whole amount of income" received by its agent or manager for any joint stock company or corporation established abroad or out of the limits of the Province carrying on business in the city of St. John. The Supreme Court decided that "income" meant all items of profits on the transactions of a business during a fiscal year without regard to any losses arising from the same business during that year. This view was dissented from by the Judicial Committee, in whose judgment it is said: "It must always be borne in mind that the tax is imposed on the income received during the fiscal year, and what therefore has to be ascertained for the purpose of assessment is the income for an entire year. There can be no doubt that in the natural and ordinary meaning of language the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces, and the proprietor can receive from it." And again: "There is nothing in the enactment imposing the tax, nor in the context, which should induce us to construe the word 'income,' when applied to the income of a commercial business for a year, otherwise than in its natural and commonly accepted sense, as the balance of gain over loss,

Judgment.

OSLER,
J.A.

and consequently they are of opinion that where no such gain has been made in the fiscal year, there is no income or fund which is capable of being assessed."

This case though it clears the ground in one direction shewing that only the excess of receipts over expenditure—the balance of gain over loss—can be called the income of a commercial business such as a bank or an insurance company is yet not decisive of the case before us, because it was not there necessary to determine the question, which under the circumstances indeed could not have arisen, whether moneys payable out of profits—moneys which would not have been payable at all unless profits had been realized—ought to be considered as part of the income of the corporation, part of the excess of gain over loss, of receipts over expenditure. That question arose and was decided in the subsequent case of *Last v. London Assurance Corporation* (1885), 10 App. Cas. 438.

Mr. Bruce argued very earnestly that this case had little or no application to the present because it was a decision upon the language of the Imperial Income Tax Act, 16 & 17 Vict. ch. 34, by which revenue is provided for the Imperial government and turned upon the meaning of the words, "annual profits and gains," as used in schedule D. of the Act, upon which the income tax is payable. There is nothing, however, in that Act which indicates that these words are used in any larger sense as denoting income for taxable purposes than we should attribute to them under the authority of the case in the Privy Council: see *per* Lord FitzGerald in *Last's* case, at p. 450; and *Mersey Docks v. Lucas* (1883), 8 App. Cas. 891. Nor can the meaning of the word "income" or the words "profits or gains," be affected by the fact that the one is used in an Imperial Act for providing a revenue for the Imperial government, while the other occurs in a provincial assessment Act for providing one for domestic or municipal purposes only. The provisions of the latter are, if anything, more comprehensive, for section 35 expressly declares that taxable income is the excess of net personal earnings or income over the specified exceptions.

It is the same income which is dealt with in both cases though in the case of *Last v. London Assurance*, we have it very clearly laid down by the majority of the law lords, and to my mind in the judgment of Lord Blackburn on very intelligible and satisfactory grounds, that so much of the "annual profits or gains," *i.e.*, of the surplus of receipts over expenditure, of the company as were payable to the participating policy holders were, as "annual profits or gains" of the company, part of their income and liable to the income tax, and that the payments contracted to be made to such policy holders out of such profits or gains were not an expenditure to be taken into account before the balance of taxable profits was ascertained but being payable out of profits were themselves a part of such profits. Lord Blackburn held that a share in profits could by bargain be given to one who was not a shareholder, while Lord Bramwell, whose vigorous judgment shews how much may be said for the opposite side of the question, said that the whole difficulty had "arisen from the inaccurate use of the expression 'participation in profits,' instead of 'participation in the sum that would be profits but for the right to participate.'" The controversy has now been settled in opposition to Lord Bramwell's view.

Judgment.

 OSLER,
J.A.

Whether the surplus profits are allotted to the policy holders by contract as in that case, or by statute as in this, can make no difference, they still form part of the net annual income of the company, no matter how they are appropriated. They can in no sense be described as a loss, and though when made they may be an expenditure, yet they are an expenditure out of profits, not an expenditure in order to make profits, and are, therefore, on the principles established by *Last's* case, taxable as income, being profits of the same character and administered in a similar manner to those in question there. The plain object and expressed intention of the Assessment Act is that all property unless expressly exempted shall be liable to taxation. If this particular property cannot be taxed as income, or

Judgment.

OSLER,
J. A.

as interest on mortgages (as I think might have been done so far as it consists of such interest), I think it would puzzle anyone to shew how it could practically be taxed at all. As there is nothing in the Act which can be laid hold of to reduce the meaning of the word "income" below that which it really is, and is called in the company's own Act, viz., the profits realized by them in their business, these profits may well be assessed as such, and though for no doubt very good business reasons the company devote a large proportion of these to their policy holders, having compelled themselves to do so by an Act passed at their own instance, they are still part of the income of the company. To tax them is no infraction of the statute or of their bargain with their policy holders. It cannot affect the validity of the policies to the full amount the company are bound to pay, or the principles on which they provide for their payment. The only effect of the taxation is that there is so much less to divide and allot to the policy holders.

I considered this question to some extent in *Confederation Life Association v. Toronto* (1895), 22 A. R. 166, and remain of the opinion there expressed.

As to costs. This is an experiment in assessment on the part of the city, and while it turns out to be a successful one, I think each party should bear their own costs of the appeal.

MACLENNAN, J. A.:—

The company are assessed in respect of real property to the amount of \$129,000, in respect of personal property \$4,000, and in respect of income \$692,000. The question relates to the last item alone. That sum is the income of the company for the year 1896, for interest and dividends on the company's investments. Besides that sum the company received for premiums on new policies and renewals, rent of real estate, etc., the further sum of \$2,063,648. The company's payments during the same

year for expenses, death and endowment claims, cancelled policies, reinsurance premiums, etc., the sum of \$1,703,872, leaving a balance of receipts over payments of \$1,051,776, as the company's apparent income for the year, over and above all expenditure. The assessment, however, is only upon \$692,000. It appears that the most of the company's insurance is with participation in profits, and before the year 1879 it was the practice to allot to the policy holders seventy-five per cent. of the profits. In that year, however, by an amendment of its Act of Incorporation, 42 Vict. ch. 71 (D.), the proportion of profits to be allotted to policy holders was increased to not less than ninety per cent. It was contended for the company that the share of profits to which policy holders are thus entitled could not be regarded as income, for the reason that the company had no control over it, and had no option but to pay it over to the policy holders, and could not divide it among the shareholders. That argument is forcible and plausible, but I think it cannot be maintained as against the express terms of the Assessment Act. The question is whether it is part of the company's income, and it is impossible to contend the contrary. Being income it is immaterial what is done with it, it is a subject of taxation. It is earned by the company. It is called profits in the Act of 1879, and it is so in fact, and therefore income. It was also contended that the interest from investments is largely required to produce and maintain the fund out of which the company's policies are to be paid at maturity, and the evidence shews that such is the case, and that the premiums charged are fixed with reference to the interest to be earned by their investment. I do not see that this circumstance makes any difference. The policies give the assured no legal claim on the interest so earned and received. The investments and the interest arising therefrom are the property of the company. The assured have no lien thereon, they have nothing but the company's covenant for payment. The capital of the company, as well as its invested funds and other property are all a

Judgment.

MACLENNAN,
J.A.

Judgment. security to the assured, and by section 39 of the Assessment Act, R. S. O. ch. 224, the company is to be assessed as if it was a partnership and not an incorporated company. The sum in question being therefore income of the company, it is property, sec. 2, sub-secs. 8 and 10; and liable to taxation, sec. 7; unless exempted. It is clearly not within any of the exemptions, and the question is governed by section 35. This last section declares that no person deriving an income from * * any source whatever, not declared exempt by this Act, shall be assessed for a less sum than the excess of such net income during the year then last past over and above the exemptions in sub-sec. 26 of sec. 7, etc. Now, this sum of \$692,000, is not derived from any exempted source, and I think it is impossible to say that it is not liable to taxation upon the very words of this section. I think it is income within the definition of *Lawless v. Sullivan* (1881), 6 App. Cas. 373, and that it is still income notwithstanding that a large part of it may be reserved for the quinquennial allotment to policy holders as a share of profits: *Last v. London Assurance Corporation* (1885), 10 App. Cas. 438. I was for some time inclined to think that so much of the interest on investments as was necessary to be reserved by reason of the new risks taken during the year should be exempt, but I think the statute does not permit that to be done, the whole being income of a kind not exempted.

I am therefore of opinion that the appeal should be dismissed.

Moss, J. A. :—

The appellant company is a life assurance company having its head office at the city of Hamilton.

In the year 1897, the company was assessed for the year 1898, in number two ward, as follows :—

Real property	\$129,000
Personal property	4,000
Income	692,000

The company appealed to the Court of Revision in respect of the assessment for income complaining that it was too high.

Judgment.

Moss,
J.A.

Before the Court of Revision the company contended that it was only assessable in respect of income to the amount of \$34,000, and that all in excess of that sum should be struck off the assessment roll.

The Court of Revision confirmed the assessment of \$692,000, and the company then appealed to a board of three County Judges under the provisions of the Assessment Act, 1892, as amended by 60 Vict. ch. 45, sec. 70 (O.).

The board, consisting of the Senior Judge of the county of Wentworth, and the Judges of the counties of Halton and Brant, heard evidence and argument and after consideration confirmed the assessment and dismissed the appeal; and the company appealed to this Court.

Mr. Bruce for the appellants contended that the income assessable under the Act is the amount which the shareholders of the company become entitled to receive for themselves as being their own. This he claimed amounted to no more than \$29,735.82, but he submitted to its being placed at \$34,000, that amount having been fixed by the late County Judge Sinclair, and adhered to in subsequent years though in excess of the amount properly assessable.

As to the remainder of the \$692,000 he contended that it was not income within the meaning of the Assessment Act.

The sum seems to have been fixed by the assessor as the amount shewn to have been received in former years for interest and dividends derived from the investments in which the company has placed the surplus funds which have been accumulated and form part of the assets of the company

It is not disputed that so much of these earnings as are allocated to the shareholders should be treated and assessed as income. But it is argued that the portion which may be allocated amongst the participating policy holders by

Judgment.

Moss,
J.A.

virtue of the Act of the Parliament of the Dominion, 42 Vict. ch. 71, is a liability of the company, is money of the policy holders and not of the company, and so not income of the company in respect of which it is assessable.

But it is money received by the company through its transactions. It is earnings of the company's moneys under investment.

The fact that the company does not propose to apply all of its earnings for corporate purposes or for division amongst its shareholders cannot alter the nature of the receipts.

It is due only to the constitution of the company and the relations between it and its participating policy holders, that a portion only and not all of these receipts is divisible amongst the shareholders.

The participating policy holders occupy a position somewhat analogous to that of partners in profits only, and so entitled to share in the profit income earned by the business.

The proceedings now in appeal having been taken under the Assessment Act, 1892, we must resort to it.

The personal property of this company [included in which is income (sec. 2 (10))], is to be assessed against it in the same manner as if it were an unincorporated partnership [sec. 34 (1)].

Section 31 (now sec. 35 of the R. S. O. ch. 224) seems to define the extent to which income is assessable and to virtually exclude all methods of reducing the amount of income below what may be produced by applying the rules there laid down.

Reading that section as applicable to this company it enacts that "No company deriving an income from any trade * * or other source whatsoever, not declared exempt by this Act, shall be assessed for a less sum as the amount of its net personal earnings or income during the year then last past than the excess of such earnings or income over and above the exemptions specified in subsecs. 23 and 24 and 24a of sec. 7, of this Act, and such

last year's income in excess of such exempted sums shall be held to be its net personal property * *."

Judgment.

Moss,
J.A.

All deductions other than those specified in this section are excluded.

Nowhere in the Act is this sort of income declared exempt from assessment, and the greatest amount of exempted income under sub-secs. 23 and 24 and 24a of sec. 7, is \$700.

By the very terms, therefore, of section 31, these earnings form income liable to assessment.

But for the explicit language of section 31, I would have been inclined to agree with the view suggested by Snider, Co. J.

But Mr. Bruce conceded that the application of that mode of assessment would afford but slight relief to the company.

I agree that the decision of the board of Judges has not been successfully impeached and that the appeal must be dismissed.

Appeal dismissed.

R. S. C.

SPARKS V. WOLFF.

*Will—Construction—Change in Law—“Heirs”—Primogeniture—14 & 15
Vict. ch. 6—43 Vict. ch. 14, sec. 2 (O.).*

A testator, who died on the 8th of November, 1867, by his will, made on the 15th of October, 1867, devised lands in Ontario to his wife until her death or marriage, and upon her death or marriage to his son, “should he be living at the happening of either of said contingencies,” and if not then living “unto the heirs of the said (son).” The son died in July, 1885, intestate and unmarried, and the widow died in February, 1887 :—

Held, that the Act abolishing heirship by primogeniture, 14 & 15 Vict. ch. 6, applied, and that all the brothers and sisters of the son were his “heirs” and entitled to take under this devise.

Tylee v. Deal (1873), 19 Gr. 601, and *Baldwin v. Kingstone* (1890), 18 A. R. 63, distinguished.

Judgment of *Rose, J.*, reversed.

Statement. THIS was an appeal by the plaintiff from the judgment of *ROSE, J.* :—

George Sparks, a resident of the Province of Ontario, died on the 8th of November, 1867, having first duly made on the 15th of October, 1867, his will, which contained the following devise in question in this action :—

I also give and devise to my wife, Sarah Sparks, so much of lot number eight, in said Junction Gore, in said township of Gloucester (in the Province of Ontario), as lies to the eastward of said Rideau Road, and which contains one hundred and eighty acres of land, be the same more or less, together with the right of way to be enjoyed in common as aforesaid, to have and to hold the said land so devised to her, with the appurtenances thereunto belonging, and the said right of way to my said wife during the term of her natural life if she shall remain unmarried after my death, but if she shall again be married after my death, then only until such marriage shall take place ; and upon the decease of my said wife or her being again married, I give and devise to my said son, Frederick Sparks, should he be living at the happening of either of said contingencies, his heirs and assigns forever (and should the said Fred-

erick Sparks not be living when either of said contingencies shall happen, then I give and devise unto the heirs of the said Frederick Sparks, their heirs and assigns forever) all that part of said lot number eight which lies between the said Rideau Road and a line drawn parallel to said Rideau Road across the whole breadth of said lot number eight, and commencing at and starting from a point on the northerly side line of said lot number eight, equidistant from the easterly side of said Rideau Road and the rear end of said side line, together with the said right of way across said front part of said lot number eight hereinbefore mentioned, said right of way to be enjoyed in common with all other persons entitled to use and enjoy the same under and by virtue of this my last will and testament, saving, excepting and reserving out and from the said part of said lot number eight, so next hereinbefore devised to said Frederick Sparks, his heirs and assigns, and the right of way hereinafter specially mentioned.

Statement

Frederick Sparks, the son of the testator, died in July, 1885, intestate and unmarried, leaving several brothers and sisters him surviving. Sarah Sparks, the widow of the testator, died in February, 1887. The plaintiff was a brother of Frederick Sparks, though not the eldest surviving brother, and brought the action on the 9th of February, 1897, claiming that as one of the heirs-at-law of Frederick Sparks, he was entitled to an undivided share in the lands. The defendant was a daughter of George Sparks and while not admitting the plaintiff's title and thus putting him to the proof of it claimed title herself by length of possession, and also as grantee of Abraham Sparks, the eldest surviving brother of Frederick Sparks.

The action came on for trial at Ottawa, on the 17th of September, 1897, before ROSE, J., who, on the authority of *Tylee v. Deal* (1873), 19 Gr. 601, and *Baldwin v. Kingstone* (1890), 18 A. R. 63, held that the eldest surviving brother of Frederick Sparks was his heir and entitled to take under the devise and that the plaintiff had no interest in the land.

Argument. The plaintiff appealed and the appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 25th of March, 1898.

Armour, Q.C., for the appellant.

The decision is against, not in accordance with *Tylee v. Deal* (1873), 19 Gr. 601, and *Baldwin v. Kingstone* (1890), 18 A. R. 63, upon which the learned Judge based his judgment. These cases proceeded upon the hypothesis that a testator is assumed to know the law as it stood at the time when he made his will, and to adopt the legal signification then given to the word "heirs." Upon the same reasoning this testator must be supposed to have intended the land to go to those who according to law would have taken as heirs, if the land had descended.

The "heirs" are the persons who at the time the will takes effect would be entitled in case of intestacy. It is a mere question of identification. There is strictly speaking no such person as "heir" in this Province and the English cases in principle shew this. In England it has been held that a devise of chattels to the "heir" goes to the person who would inherit the testator's land. It is not a question of tenure or of descent but just a mode of describing the devisee: *Thorp v. Owen* (1854), 2 Sm. & G. 90; *Evans v. Evans*, [1892] 2 Ch. 173.

The plural words "heirs" and "their" are used here, and the intention evidently was that more than one person would take. The Act of 1880, 43 Vict. ch. 14, sec 2 (O.), does not affect the case; it was merely declaratory of the law.

Osler, Q.C., for the respondent. The case is governed by *Tylee v. Deal* (1873), 19 Gr. 601, which has been adopted and approved in *Baldwin v. Kingstone* (1890), 18 A. R. 63. *Tylee v. Deal*, decided that the Act abolishing heirship by primogeniture, 14 & 15 Vict. ch. 6, applied only to cases of intestacy and was not intended to affect any limitation of an estate by deed or will. The Legislature accepted the judgment in *Tylee v. Deal*, as to

the wills of all testators who died before the 5th of March, 1880, containing a devise to the "heir" or "heirs" but changed the law as to the wills of all testators dying after 1880, and declared that after that date a devise of land to the "heir" or "heirs" should be construed to be a devise to the person or persons to whom such real estate would descend under the law of Ontario in case of an intestacy. The date of the death of the testator and not the date of the will is thus made the test as to the interpretation, so that if two testators died after 1880, the will of one being made before 1851, and the will of the other being made after that date both wills must receive the same construction. It would be absurd to say that the two testators used the same word "heir" or "heirs" in a different sense. The use of the plural "heirs" is of no importance. The plural was used in *Tylee v. Deal*.

Armour, Q.C., in reply.

June 30th, 1898. BURTON, C.J.O.:—

The will under which the question in this case arises was made after the Act abolishing primogeniture came into effect (1st January, 1852) and before the passing of the Act of 1880.

The devise was of a parcel of land by George Sparks in fee simple to his wife for life, remainder after her death or second marriage, to her son Frederick should he then be living, but should he not then be living, to the heirs of the said Frederick, their heirs and assigns for ever.

Frederick died before his mother in 1885 intestate and unmarried but leaving six brothers and four sisters of whom Abraham was the eldest and who claimed to be entitled under the devise to the heir of Frederick, and he conveyed to his sister the defendant Mrs. Wolff.

The contest now is whether on the death of the widow, Abraham, the eldest son, who, before the Act of 1852, would in the case of intestacy have been entitled to inherit as heir-at-law, was the party intended under the descrip-

Judgment.
BURTON,
C.J.O.

tion in the will, or whether under the word "heirs" the whole of the brothers and sisters became entitled in equal shares as the persons who, as the law then stood, would in the case of intestacy have inherited.

The learned trial Judge has held that notwithstanding the abolishing of the law of primogeniture, as the will was made before the Act of 1880, the person intended by the description is the common law heir and that Abraham was intended to the exclusion of his brothers and sisters and this appeal is against that decision.

The learned Judge felt bound by the decision in *Tylee v. Deal*, but peculiar reasons existed for that decision apart altogether from the fact that that will was made before the passing or rather coming into operation of our Act altering the law in reference to primogeniture. It was made in England where the testator resided and dealt with land there as well as in Canada and presumably the testator and his advisers had no knowledge of our Canadian law. He evidently intended as regards the lands in England that the common law heir should take and there was nothing to shew that a different person was intended to take the devise in Canada.

I think that nothing said by me in the *Baldwin* case lends any countenance to the view that in a case of a will made after the change in the law I should still hold that the same construction should be given to the word "heirs" found as it is in this will; the same reasoning which compelled me to hold in that case that the eldest son only was intended compels me to hold that the word where used since the change in the law must be taken to be used in its altered sense.

That many years previously a different law had existed can surely be no reason for holding that the same meaning is to be continued to be given to the word long after that state of the law had ceased to exist. With deference, I think that the only inquiry is who is the heir of the party referred to by the law of this country at the time of the making of the will and not who would have been the heir

if the death had occurred or the will been made an indefinite number of years before. On that inquiry it would have been found that the ten children were the heirs and they in my opinion were the parties intended to be described by the testator as the objects of his bounty in the contingency contemplated.

Judgment.

BURTON,
C.J.O.

Nor do I think the case is affected by sec. 41 which declares that the Act shall not affect any limitation of any estate by deed or will or any estate held in trust. I have always supposed that that section referred to cases in which the word was used for the purpose of defining the estate intended to be devised or limited and not to a case where it is not used as a word of limitation but as a word of purchase to describe the person or class of persons intended to take.

The Act of 1880 was passed, I imagine, to remove doubts but not either as declaratory of the law previously to its passing or as effecting a change in the law as to testators dying after that year. I do not think that is the construction to be given to that enactment and on the broad ground that the testator knew the law of inheritance when he wrote his will and intended to describe as his devisees the persons who under the then state of the law were his heirs, I think we must hold the brothers and sisters to be all entitled and that the appeal should be allowed.

OSLER, J. A. :—

I offer no opinion in this case.

MACLENNAN, J.A. :—

The question in this appeal is upon the will of George Sparks, who died in 1867, and who made his will on the 15th of October in the same year. The testator devised a parcel of land to his wife for life, or widowhood, remainder to his son Frederick in fee, should he be living at the determination of the estate given to his wife ; and if not

Judgment. he devised the same "to the heirs of Frederick, their
MACLENNAN, heirs and assigns forever." Frederick did not survive
J.A. his mother, but died in 1885, unmarried and intestate. His mother died in 1887, without having married again. Frederick Sparks had six brothers and four sisters, of whom Abraham was the eldest. After his mother's death, Abraham, claiming that he alone answered the description of Frederick's heir, conveyed the land to his sister the defendant Mrs. Wolff, who is in possession. The plaintiff George, another brother of Frederick, has brought this action to recover a one-tenth undivided share, claiming that all Frederick's brothers and sisters constitute his heirs within the meaning of the will. My brother Rose, on the authority of *Tylee v. Deal* (1873), 19 Gr. 601, and *Baldwin v. Kingstone* (1890), 18 A. R. 63, has decided that at the death of the mother the whole estate passed under the will to Abraham as Frederick's sole heir, and that his other brothers and sisters took nothing. This appeal is from that judgment.

The question depends on the effect of the Act 14 & 15 Vict. ch. 6, which abolished primogeniture in this Province which was passed on the 2nd of August, 1851, and came into force on the 1st of January, 1852. The will which was in question in *Tylee v. Deal*, was made on the 28th of November, 1851, by a testator who died domiciled in England in March, 1852. He devised lands both in England and Canada, to his wife for life, with remainder to his own right heirs for ever. Blake, Vice-Chancellor, decided that the testator's heir according to the law of primogeniture was entitled, and while holding that the Act could not apply by reason of the 41st and some other sections, except to cases of intestacy, he thought the date of execution, the time of passing of the Act, the place of residence of the testator, and all the surrounding circumstances aided the conclusion that the same person who was to take the English land was intended to have the Canadian land also.

The will in *Baldwin v. Kingstone* was made not only before the Act came into force, but also before it was

passed, namely on the 14th of August, 1850, and the testator died on the 5th of January, 1866. The devise was to two of the testator's nephews in fee, and in case of the death of either of them in the testator's life time, his share was given to his heir or heirs at law. One of the nephews died in the testator's life time, and this Court held that the eldest son alone was entitled, to the exclusion of his brothers and sisters. The case was heard by a Court composed of the present Chief Justice, Galt, C.J., and my brothers Osler and Ferguson. The learned Chief Justice of this Court held that the Act could not affect a will made before it was passed, and expressly abstained from offering any opinion upon such a devise or will made after the Act.

Judgment.

 MACLENNAN,
 J.A.

My brother Osler also held that the law as it stood at the making of the will ought to govern its construction; but he also expressed the opinion that by the terms of the Act itself the devise was expressly excluded from its operation. He also quoted the Act 43 Vict. ch. 14 (O.), as a recognition by the Legislature of the decision in *Tylee v. Deal*. My brother Ferguson was also of opinion that the eldest son was entitled because the will was made before the Act became law, and should be construed as the law stood at that time. Galt, C.J., dissented from the judgment of the majority of the Court, being of opinion that the Act did control the construction of the will, and that all the heirs as constituted by the Act were entitled to shares. It thus appears that my brother Osler alone expressed an opinion which would be applicable to the circumstances of the present case, and the decision in *Baldwin v. Kingstone* is therefore not one which binds us in the present appeal. *Baldwin v. Kingstone* was carried to the Privy Council and in a note in the appendix 18 A. R. it is said that the Judicial Committee at the conclusion of the argument expressed its concurrence with the judgment of this Court upon the question of construction. Judgment was reserved upon another question, but the case went no farther in consequence of the settlement by the parties. We do not know on which ground the

Judgment. Judicial Committee approved of the judgment of this Court, and therefore its opinion affords us no assistance.

MACLENNAN,
J.A.

I am of opinion that this will must be construed with reference to the changed law. While differing from the opinion of Galt, C.J., with reference to a will made before the Act was passed, I adopt his reasoning as entirely applicable to the present will. I think the only question is whether the Act has changed the meaning of the word "heirs" in this Province with reference to the devolution of real estate in general. If it has, then I think the word must be taken to be used in its altered sense wherever it has been used since the Act, unless the subject or the context requires the contrary. I think we are bound so to decide by the judgment of the majority in *Baldwin v. Kingstone*. That judgment as we have seen proceeded on this, that the testator must have penned his will with reference to the law as it stood when he made it. So this will must be construed with reference to the altered law, as it was at its date, and had been for fifteen years before. Then has the Act altered the sense and meaning of the word, and if so, to what extent? The general meaning of the word has not been changed. It means the person or persons to whom the land of another person descends by operation of law, when that other person dies intestate. As used in this will it is not a technical word at all, and having regard to the context that is its sense and meaning here; that much is not disputed, it is the common ground of the parties; the difference between them is, that the plaintiff says it is heirs according to the law when the will was made, and when Frederick died, the defendant says, no, but according to a law which formerly existed and which had long before been abolished. The Act 14 & 15 Vict. ch. 6, is entitled an Act to abolish the right of primogeniture in the succession to real estate held in fee simple or for the life of another in Upper Canada, and to provide for a different division thereof, and the preamble recites the expediency of doing so. It then provides for the succession in a number of cases, and by section 10 enacts that

if there be no heir entitled to take under any of the preceding sections the inheritance shall descend in a defined manner. Again by section 15 it is enacted how it is to descend "on failure of heirs under the preceding rules." Section 24 in dealing with partition speaks of the person or persons who would have been the heir or heirs at law if the Act had not been passed. All that shews clearly that with regard to estates in fee simple and for the life of another, the legislature was intending to abolish the old law of heirship, and to substitute another law therefor. The will in question was dealing with an estate in fee simple, and therefore the new law is applicable to it to all intents and purposes. It is true that this Act does not abolish the old law of descent for all purposes. By section 19 it provides that it shall not affect any estate which although held in fee simple or for the life of another is so held in trust for any other person, but that all such estates shall remain, pass and descend as if the Act had not been passed. But the present estate was not held upon any trust for another person and therefore is not within the exception, and the exception only affirms the rule. It follows in my opinion that the law of heirship relating to the land which was the subject of this devise was, at the making of the will and at the death of Frederick, the law as altered by the Act of 1852, and that at the time of his death all his brothers and sisters and not Abraham alone were his heirs within the meaning of the will.

It was, however, contended that certain other words contained in sec. 19 of the Act excluded its operation from cases like the present. That section declares that the provisions of the Act shall "not affect any limitation of any estate by deed or will." I am unable to see that this exception has any application; I think it means no more than this, that the word "heirs" may still be used technically, to limit or define an estate in fee simple or in fee tail as formerly, either in a deed or in a will. But here the word is not used as a word of limitation at all. It is a word of purchase. It is intended, not to limit or define the extent

Judgment.

MACLENNAN,
J.A.

Judgment. of the estate which is being devised, but to designate the
MACLENNAN, person or class of persons to whom the estate is given.
J.A. On this point I am constrained to differ from the opinion
of my learned brother Osler expressed in *Baldwin v. Kingstone*, pp. 89, 90.

It was also contended that the Act 43 Vict. ch. 14, sec. 2 (O.), which enacted that a devise of real estate to an heir or to heirs should be construed to mean a devise to the person or persons to whom such estate would descend by the law of Ontario in case of intestacy, amounted to a declaration that the law had theretofore been otherwise. I do not think we can give such an effect as that to the statute: *Dore v. Gray* (1788), 2 T. R. 358, *Ex. p. Lloyd* (1851), 1 Sim. N. S. 248, cited Maxwell, 3rd ed., p. 434.

For these reasons I am of opinion that the appeal should be allowed and that there should be judgment for the plaintiff.

Moss, J. A. :—

The question is who under the will in question is or are entitled to the devised real estate as the “heirs” of Frederick Sparks.

To borrow the remark of Sir Geo. Jessel, M. R., in *Smith v. Butcher* (1878), 10 Ch. D. at p. 116: “If I were at liberty to guess what he [the testator] meant by the words ‘lawful heir or heirs,’ I should guess that he meant ‘children’; but I am not at liberty to guess; I must take the words of the will as they stand.”

Upon the argument there was much canvassing of the decisions and opinions of the learned Judges in *Tylee v. Deal*, and *Baldwin v. Kingstone*. The defendant contended that, more particularly when read in connection with the Act 43 Vict. ch. 14, sec. 2 (O.), these cases virtually settled the question in her favour.

Her counsel relied strongly upon the provisions of sec. 2 of that Act (now sec. 31 of R. S. O. ch. 128) and at first sight they appear to lend weight to the respondent's

argument that inasmuch as the testator died before the 5th of March, 1880, the law must be taken to be that in this devise the word "heirs" is to be read as meaning Frederick Sparks' common law heir and not the persons designated in the enactment.

Judgment.

Moss,
J.A.

The enactment read literally does not appear to mean anything in the case of a devise to the heir or heirs of another person than the testator.

Leaving out the case of a devise to the heir or heirs of a testator the section reads "where any real estate is devised by any testator * * * to the heir or heirs of any other person and no contrary or other intention is signified by the will, the words 'heir' and 'heirs' shall be construed to mean the person or persons to whom such real estate would descend under the law of Ontario in case of an intestacy."

This language construed literally means the heirs of the testator for they are the persons to whom *his* real estate would descend in case of intestacy.

But without giving too much effect to this reading of the section it is sufficient to say that it does not in terms assume to change the law existing previously to its enactment.

Perhaps it may be said of it, as has been frequently remarked of the 13 Eliz. ch. 5, that it is merely declaratory of the former law, though it may not also be entitled to the commendation bestowed upon the earlier statute that it more expressly lays down and more clearly defines the law on the subject.

There are some points of resemblance, but more of substantial difference between the will now in question and the wills in *Tylee v. Deal*, and *Baldwin v. Kingstone*.

The salient differences between it and the will in *Tylee v. Deal*, are that the latter was made after the passing but before the coming into force of the Primogeniture Act, 14 & 15 Vict. ch. 6, that the testator resided and made the will in England, that it dealt with real estate in England as well as in Upper Canada, and that the devise was

Judgment

MOSS,
J.A.

to the testator's "right heirs," while the will in this case was made in Ontario more than fifteen years after the Primogeniture Act came into force, by a testator resident in Ontario with reference to real estate situate only in Ontario; and the devise is to the "heirs" not of the testator but of another person.

The will in *Baldwin v. Kingstone*, was made in Upper Canada, before the passing of the Primogeniture Act, by a testator resident in Upper Canada, with reference to real estate situate exclusively in Upper Canada, and the devise was to the "heir at law" or "heirs at law," not of the testator but of another.

All three testators died after the Primogeniture Act came into force.

It is not necessary for the purposes of this case to question in the least the decisions in either *Tylee v. Deal*, or *Baldwin v. Kingstone*, for in my opinion they do not govern the will before us.

No questions arise here as to the effect of a change of the law between the making of the will and the happening of the contingency provided for.

It is only necessary to apply a well understood principle of construction, viz., that in a devise of real estate to one or in case of his death to his heirs the Court interprets the word "heirs" as denoting those who in the event of the devisee's death would be entitled to succeed to real estate claiming *ab intestato*. See *Doody v. Higgins* (1856), 2 K. & J. 729, where although the question was as to a bequest of personalty Lord Hatherley (then Vice-Chancellor Page Wood) states the rule as to realty at p. 734.

In *Smith v. Butcher* (1878), 10 Ch. D., at p. 116, the Master of the Rolls says: "Now there is no expression which has a clearer meaning in law than the expression 'lawful heirs.' It means the person or persons who either alone or together would succeed to the fee simple estate of which the intestate ancestor died seized in possession at the time of his death. That is what it means: there can be no doubt as to what it means."

And there is no distinction in meaning between "heirs" and "lawful heirs."

There are of course many exceptions to the general rule to be found turning upon peculiar expressions or the context, but there is no such feature in this case.

Therefore, as to persons dying between the 1st of January, 1852, and the 1st of July, 1886, the inquiry who, in the event of their death intestate seized in fee simple or for the life of another of any real estate, is or are entitled to succeed to such real estate claiming *ab intestato* must be answered by reference to the Act 14 & 15 Vict. ch. 6, as carried forward through the subsequent consolidation and revisions of the statutes of the Province.

Under these provisions it is beyond question I think that when this will was made and the testator and Frederick Sparks died the persons who, upon the death of the latter would succeed to his real estate claiming upon intestacy, were the whole of his brothers and sisters equally and not his eldest brother alone.

That being so it follows that upon his death the devise of the lands in question took effect in his brothers and sisters and that upon the death of the tenant for life they became entitled in possession to the devised property as tenants in common.

The result is that the ground of defence upon which the defendant succeeded at the trial being now determined adversely to her the case should, if the defendant desires it, be remitted for trial in order that the other questions raised may be tried out.

Appeal allowed.

R. S. C.

Judgment.

Moss,
J.A.

THOMPSON V. THE BRANTFORD ELECTRIC AND OPERATING
COMPANY (LIMITED).

*Company—Contract with Trading Corporation—Absence of Seal—Manager's
Authority—Purchase in Ordinary Course of Business.*

The defendants, by resolution of the board of directors, authorized their manager to purchase from the plaintiff, on certain terms of credit, a machine necessary for the carrying on of the defendants' business. The defendants' manager bought the machine, but on different terms, the plaintiff having no knowledge of the board's resolution; and the defendants received and used the machine:—

Held, that the purchase was within the scope of the manager's authority, and that the defendants were liable for the price of the machine.

Judgment of MEREDITH, J., reversed in part.

Statement. THIS was an appeal by the plaintiff and a cross-appeal by the defendants from the judgment of MEREDITH, J., at the trial.

The following statement of the facts is taken from the judgment of OSLER, J. A.:—

The action is for goods sold and delivered to and work done by the plaintiff for the defendants, and the subject of the plaintiff's appeal is a sum of \$1,000, the price of a 150 horse-power generator, with a spare running gear and a set of sliding rails. These goods undoubtedly came into the possession of the defendants, and as to them the only question is whether there was a valid contract of sale. The learned trial Judge held that there was not, and dismissed the action as to so much of the claim. The facts are briefly as follows.

A trading company known as the Brantford Electric and Power Company was carrying on a business similar to that of the defendants in Brantford, and went into liquidation. Pending the disposition of the assets the liquidator rented from the plaintiff the generator in question for the purposes of the business for a period of five weeks, after which the agreement might be cancelled by either party giving one week's notice. The company was to have the option of purchasing the machine with spare armature, shaft and commutator for \$1,400. In the event

of its not being purchased in Brantford the company was to return it in good order to the plaintiff at Waterford. The correspondence specifying these terms was closed on the 13th of February, 1896. Soon afterwards the assets of the company were sold to the defendant company, into whose possession came also the plaintiff's generator. Some correspondence then took place between the plaintiff and the liquidator of the former company and the defendants respecting the renting of the machine for a short time further, which the plaintiff was unwilling to do, insisting that if it was not bought it must be returned. The defendants, with the consent of the liquidator and of the plaintiff, expressly assumed the position of the old company under the existing arrangement with the plaintiff, and correspondence between the plaintiff and the new company continued on the subject of the sale, the details of which need not be particularized, as on the 28th of March, 1896, Wilkes, the president of the company, wrote definitely to the plaintiff: "From the writer's conversation with your Mr. Thompson, he fully expected you would make an offer to rent the generator for at least six weeks longer, with privilege to purchase. In consequence of the absence in England of two of our directors it is hardly possible I can get the remaining ones to take the responsibility of purchasing. You might, however, in the meantime, let us know if you would be willing to take \$1,000 for the generator on six and twelve months' time, and I will let the directors know and see what can be done." 'This letter is signed in the company's name by G. W. Wilkes, president.

Statement.

The plaintiff replied on the 8th of April, that he would not accept \$1,000 for the generator and spare running gear, but with the hope of closing the matter at once would accept \$1,200 on four, eight and twelve months' time, with interest at seven per cent. If the offer was not immediately accepted the plaintiff required the generator to be returned at once.

On the 9th of April, Mr. Wilkes telegraphed the plaintiff:

Statement. "The board authorizes purchase at \$1,000 cash. Answer immediately." And the plaintiff did answer immediately in the same way: "We accept your offer of \$1,000 cash."

On the following day the defendants' president wrote: "After writing you yesterday we wired you offering \$1,000 for the 150 horse-power generator, and received your reply accepting the same. You will send us the extra armatures, also a twenty-six inch pulley in place of the twenty-eight, as agreed by your traveller. We expect the usual guarantee for one year. Your guarantee will include the power generator to 150 horse."

The plaintiff replied on the 11th of April, "We have your favour of the 10th inst., confirming order for power generator. We have booked your order for the same, and will at once ship the extra running gear." Then, after referring to the order for the twenty-six inch pulley: "As to guarantee, our offers did not include any guarantee, and we would not consider giving any at the price; your company has had the generator in use for some time, and it cannot have any inherent defects. It was built by the Reliance Company for the Mimico Railway Company, its rating being 160 horse-power." To this position the plaintiff adhered throughout the further correspondence on the subject, but there was no suggestion by the defendants that there had not been a completed contract of purchase until after the machine broke down while in use, which occurred about the 8th of May. The plaintiff had in the meantime supplied the other articles included with the generator, and had drawn upon the defendants for the price.

There was evidence that the directors of the company had on or about the 1st of April passed a resolution that the generator should be purchased if it could be obtained at \$1,000 at six and twelve months, with interest, and the president seemed unable to explain how it was that he had telegraphed in the terms of the message of the 9th of April, that purchase at \$1,000 cash was authorized, further than that when he did so telegraph that was his impression of the terms of the resolution.

The cross-appeal was brought in respect of an item of Statement
\$146.65 for re-winding an armature; but the question in dispute was not of general interest.

The appeal and cross-appeal were argued before BURTON, C.J.O., OSLER and MACLENNAN, JJ.A., on the 7th of April, 1898.

Aylesworth, Q. C., for the appellant. There is a valid contract of sale in writing satisfying all the requirements of sec. 17 of the Statute of Frauds. The machinery in question was required by the company for the purposes of their business, and after the purchase was used by the company in their business, and the president was acting within the scope of his authority in making the purchase on behalf of the company. There was an acceptance by the company of the goods in question, and a final receipt and user of them not only ample to satisfy the requirement of the Statute of Frauds, but such as without more afforded sufficient evidence of an actual contract of purchase by the defendant company: *Beverley v. Lincoln Gas Co.* (1837), 6 A. & E. 829; *Pauling v. London & North Western R. W. Co.* (1853), 8 Ex. 867. [The learned counsel then dealt with the evidence as to the condition of the machine, and as to the alleged breach of warranty.]

Wilkes, Q. C., for the respondents. The defendants were purchasers, from the liquidator of the former company, of the plant and business of that company, and at the time of the purchase the generator in question was rented to and in use by the former company, and the defendant company lawfully came into possession of the generator, so that the fact of possession does not advance the plaintiff's case. The telegram of the president is in no sense an offer, but merely an intimation that authority to purchase had been given, and no acceptance of any offer by the defendants was given by the plaintiff. The plaintiff does not shew any authority, express or implied, except the authority to purchase on credit, and the offer to pur-

Argument. chase on credit was not accepted by the plaintiff. The correspondence shews, in any event, that if any agreement was intended to be entered into by the defendant company, it was an agreement to purchase on an express warranty by the plaintiff that the generator should be of 150 horse-power, and should be guaranteed for one year. [The learned counsel then dealt with this question and with the cross-appeal.]

Aylesworth, Q. C., in reply. It is not necessary that the agent should have a written authority to enable him to sign the memorandum of the bargain, and a subsequent ratification of his authority is equivalent to express authority previously conferred : *Maclean v. Dunn* (1828), 4 Bing. 722 ; *Reuter v. Electric Telegraph Co.* (1856), 6 E. & B. 341. It was not necessary that the authority of the president to make the purchase should have been evidenced by the seal of the company, or that there should have been any formal resolution of the board of directors authorizing the purchase. This contract of purchase if not wholly necessary to the purposes for which the defendant corporation exists, was certainly incidental thereto, and is a contract of a trading corporation made in the ordinary course of its business, and for the purposes thereof. It is, therefore, valid and binding upon the company, though not under the corporate seal : *South of Ireland Colliery Co. v. Waddell* (1868), L. R. 3 C. P. 463 ; (1869), 4 C. P. 617 ; *Bank of Columbia v. Patterson's Administrator* (1813), 7 Cranch 299, at p. 306.

June 30th, 1898. BURTON, C. J. O. :—

It does not appear to me to make any difference in the case that previously to making the contract the goods, which are the subject of it, had come rightfully into the possession of the defendants from a third party who had used them under a contract of hiring from the plaintiff. The plaintiff had given notice that the hiring must be put an end to and the goods returned to him according to the original agreement, unless the defendants were willing to purchase.

[The learned Chief Justice referred to the terms of the correspondence and continued:]

Judgment.

BURTON,
C.J.O.

Here is a valid contract of sale in writing satisfying all the requirements of sec. 17 of the Statute of Frauds, the letters and telegrams which passed between the parties constituting a sufficient note or memorandum in writing, signed by the defendants, unless they are now allowed to shew that in point of fact there was no resolution duly passed by the board of directors, authorizing the president or manager to sign such a memorandum.

The defendants are a trading corporation established for carrying on the business for which they are incorporated and after much conflict it is now very clearly established that a contract of this kind does not require to be under seal.

A company can only carry on business by agents, managers, and others, and if the contracts made by these persons are contracts which relate to objects and purposes of the company and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company though not under seal.

If it is directly connected with the object of the corporation in carrying on the trade, the magnitude or insignificance of the contract is not an element in deciding cases of this kind. It is clear, therefore, that this was a contract not required to be under seal.

But it is said that the act of the manager here had not received the assent of the board as he represented and is, therefore, not binding upon the company.

The directors of a company are not, however, necessarily its only agents. It is generally necessary for them to employ other persons to act for the company, and where this is the case those persons will also have power to bind the company within the limits of their agency, and as a rule their authority cannot be denied unless their employment was beyond the power of the directors or they had been employed irregularly and the person dealing with them had notice of the irregularity.

Judgment.

BURTON,
C.J.O.

Here Mr. Wilkes was not only the chief officer of the company, but he was appointed manager of the company at a salary for the purpose of conducting all matters of this description. No doubt dealings with these companies are not precisely in the same position as ordinary partnerships, persons so dealing are bound by the Act of Parliament and the charter if there is anything in them which would have shewn that this act was unauthorized, and if the charter itself had shewn a prohibition to the agent to carry out a purchase of this magnitude the plaintiff would have entered into it at his peril, without a resolution of the board.

The evidence shews that the manager had a general authority to act in a matter of this nature, and the plaintiff who was acting in good faith and in ignorance that he had not obtained the consent of the directors to the particular purchase, cannot I think be affected by it, in addition to which the generator was actually received and used by the company after the purchase.

It appears to me there would be a stop to all business if in a case in which a general authority of this kind is given the party dealing with the manager was bound to enquire whether the statement was true that he had obtained the authority of the directors. That, if there is anything improper in it, is a matter which concerned only the shareholders and directors, and not a person dealing *bonâ fide* with him in good faith.

As to the cross-appeal the defendants have failed to convince the learned Judge that the work was badly done in the first instance and no sufficient reason has been made out upon the evidence for our interference.

I think the appeal should be allowed, and the cross-appeal dismissed.

OSLER, J. A.:—

It appears to me impossible for the defendants even plausibly to contend that the telegrams of the 9th April, read as of course they must be in connection with the

previous correspondence shewing the subject to which they relate, do not on their face constitute a good contract of sale of the machine in question, satisfying all the requirements of sec. 17 of the Statute of Frauds. They are confirmed by the letters which passed between the parties on the 10th and 11th April, and cannot be affected in the least by the defendants' demand, after the rights of both parties had been fixed, for a further term, viz., a guarantee of the machine.

If, then, subject to the question of the power of the company's president to make it, there was a valid contract of sale, it is not difficult to infer, from the subsequent use of the machine by the defendants who had up to that time and from about the 1st March used it as renters or hirers, a delivery to and acceptance by them of it under the new contract.

The only question, therefore, on the plaintiff's appeal, is that of the president's authority.

If, under the circumstances, he should be held to have had authority, the plaintiff is not affected by the fact that he may have exceeded the instructions of his board of directors under the resolution of the 1st of April, if that was its date, for of this the plaintiff had no notice.

The defendants are a trading corporation, and Mr. Wilkes was their president, and from his own evidence may well be inferred to have been also the general manager of the business affairs of the corporation. No complaint is made of his want of authority to rent the generator from the plaintiff, and to agree that the defendants should assume the position of the old company with regard to it. The machine itself was of a kind essential to some of the very purposes for which the company had been brought into existence, and which they were then actually carrying on by its means. The board of directors were themselves of that opinion as they did formally pass a resolution authorizing the purchase, though a purchase on a term of credit instead of for cash.

Several modern cases have established the clear de-

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J. A.

parture, along certain lines, from the strict rule formerly applied in respect of the power of contract with corporations, viz., that except as to trifling matters of frequent recurrence or matters of convenience amounting to necessity, such contracts must be under the seal of the corporation.

We now find it laid down that the principle of convenience almost amounting to necessity, "will cover all contracts which can fairly be treated as necessary and incidental to the purposes for which the corporation exists: and that in the case of a trading corporation all contracts made in the ordinary course of its business or for purposes connected therewith fall within this description": Pollock on Contracts, 6th ed., p. 145.

In support of this proposition it seems only necessary to refer to the now familiar case of *South of Ireland Colliery Co. v. Waddle* (1868), L. R. 3 C. P. 463; In Ex. Ch. (1869), L. R. 4 C. P. 617, a case which has frequently been acted upon in our Courts. See also *Albert Cheese Co. v. Leeming* (1880), 31 C. P. 272; *Bain v. Anderson* (1896), 27 O. R. 369.

There is nothing in the instrument incorporating the company, or in the general Act, which imposes upon them the obligation of contracting under their common seal in respect of such a transaction as this, nor is there anything in the rules and regulations of the company, so far as they have been proved, to limit the authority of the manager to bind them by entering into such a contract. The requirements of the Statute of Frauds have been complied with, the contract being sufficiently evidenced by writing, but even if this had been wanting, there is evidence of a delivery and acceptance of the article upon which the action may well be maintained.

It was not a machine manufactured by the plaintiff, and I think there is no evidence upon which it might be held that it was not a merchantable article so as to excuse the defendants from payment of the price.

As to the defendants' cross-appeal a careful considera-

tion of the evidence satisfies me that we ought not to interfere with the finding of the learned trial Judge in this respect.

Judgment.
OSLER,
 J.A.

The appeal must therefore be allowed, and the judgment at the trial increased by the sum of \$1,000, and interest from the 8th of April, 1896, and the cross-appeal must be dismissed, both with costs.

MACLENNAN, J. A. :—

I think this appeal should be allowed. The five weeks for which the machine was rented expired on the 19th of March. On the 20th the plaintiff gave notice cancelling the letting at the expiration of another week, which expired on the 27th of March. By the terms of the letting, if not purchased it was then to be returned F. O. B. at Waterford. It was not returned, but by a resolution of the defendants' board of the 1st of April, it was to be purchased if it could be bought at \$1,000 at six and twelve months with interest. On the 8th of April, the president, Mr. Wilkes, telegraphed to the plaintiff: "Board authorizes purchase at \$1,000 cash. Answer immediately." To which the plaintiff replied, also by telegram, the same day: "We accept your offer of \$1,000 cash." On the 10th of April, Mr. Wilkes writes to the plaintiff referring to the telegrams, and saying, "After writing you yesterday we wired you offering \$1,000 for the 150 horse-power generator, and received your reply accepting the same." Those telegrams and this letter together constitute a perfect contract in writing, even if, as contended, the first telegram was not itself an offer, and merely a statement that the board had given authority to purchase. The sole question is, therefore, whether the company is bound by the contract made by the president. I think the company is bound. The board met on the 1st of April, and did not meet again until the 26th of June. In the meantime the machine was retained and used by the company in its business until the 8th of May, when it was disabled by an accident.

Judgment. Mr. Wilkes was not only the president of the company,
MACLENNAN, but its manager, as shewn by the correspondence, and
J.A. conducted its business between the two meetings of the
board which have been mentioned, ordering such new
machinery during that time as the business called for.

The company's business was the generation of electricity, and supplying light and power to customers, and had been and was in active operation for some time before and also at and after the middle of March. The machine in question, or some other machine of equal power and capacity, was required for the business. It was under these circumstances that, although the resolution of the board on the 1st of April was to buy the machine for \$1,000 payable with interest at six and twelve months, the president determined to buy it for cash instead of on credit, and did so without consulting the board. What he says about it is, that he consulted with one member of the board, and took the responsibility, expecting that the board would support it. There can be no doubt whatever that having regard to the nature of the company's business, its president and manager had power to change the terms of payment as he did for this machine, which he had been authorized to buy for \$1,000, without consulting the board or getting express authority for doing so: *South of Ireland Colliery Co. v. Waddle* (1868), L. R. 3 C. P. 463, and *ib.*, in appeal, (1869), L. R. 4 C. P. 617.

The appeal should be allowed, and the plaintiff should have judgment for the \$1,000 and interest from the 8th of April, 1896, in addition to the sum for which they had judgment in the Court below.

Appeal allowed and cross-appeal dismissed.

R. S. C.

IN RE THE BELL TELEPHONE COMPANY AND THE
CITY OF HAMILTON.

*Assessment and Taxes—Telephone Company—Poles, Wires, Conduits
and Cables.*

In assessing for purposes of taxation the poles, wires, conduits and cables of a telephone company, the cost of construction, or the value as part of a going concern, is not the test; they must be valued, in the assessment division in which they happen to be, just as materials which, if sold or taken in payment of a just debt from a solvent debtor, would have to be removed and taken away by the purchaser or creditor. Judgment of the Board of County Judges reversed.

THIS was an appeal by The Bell Telephone Company Statement.
from the judgment of SNIDER, HAMILTON, and HARDY, Co.
JJ., sitting, under the Assessment Act, as a board of appeal
from the Court of Revision of the city of Hamilton.

The question involved was the proper mode of assessing the poles, wires, conduits and cables, of the company, used by them in carrying on their business as a telephone company. The board of Judges held that these should be assessed as part of a going concern, and fixed the assessable value by deducting from the cost of construction fifteen per cent. for depreciation and wear and tear.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 30th of May, 1898.

G. Lynch-Staunton, and *E. H. Ambrose*, for the appellants. This is an attempt to tax the franchise of the company, and is a violation of the Act, which is express in its terms. The particular property in question must be taken just as it stands—not as part of a general plant, not as part of a going concern, not at its value to the owner, not at its cost. The selling value as dead material is the test, and the assessor should not consider who the owner is, or what the property is used for: *Albany and Schenectady R. W. Co. v. Osborn* (1851), 12 Barb. 223.

Mackelcan, Q. C., for the respondents. The Act directs the assessor to appraise the property at its actual value,

Argument. and appraised value and selling value are not necessarily the same. Here the test is the value to the appellants, what it would cost them to replace it in as good condition as it now is in: Boyle on Rating, 2nd ed., p. 834; *Regina v. London School Board* (1886), 17 Q.B.D.738; *Lancashire Telephone Co. v. Manchester* (1884), 14 Q. B. D. 267.

G. Lynch-Staunton, in reply.

June 30th, 1898. BURTON, C. J. O.:—

The English authorities to which we were referred upon this argument afford but little assistance in deciding the question before us which is as to the construction of our own statute as to the mode of placing an estimate or valuation for assessment purposes upon the property of the company in ward No. 2, treating it, as it apparently must be treated, as separate and distinct from the rest of the company's property within the city: see decision of the Supreme Court in *Consumers' Gas Co. v. Toronto* (1897), 27 S. C. R. 453. This results from the property being treated as real property which has to be assessed* in the ward within which it lies.

When our assessment laws were first introduced, railway, gas and water companies, and electric telegraph companies had no existence, and it can be readily understood that there is considerable difficulty in applying to modern requirements provisions which were amply sufficient for the much more simple state of assessable property in those days.

Many of the English decisions on rating most of these modern inventions have for their ground work the provisions of the statute 43 Eliz. ch. 2 for the assessment for the relief of the poor, and are, therefore, quite inapplicable to our law, being based upon the exclusive occupation of the land, and not on the ownership.

For many years the difficulty was overcome by providing that the personal property of a company which invested the whole or the greater part of its means in gas or other

works requiring the investment of the principal part of its means in real estate should be exempt from assessment, but that the shareholders should be assessed on the income derived from such companies. This seemed a very equitable arrangement, as if the company had been assessed, in addition to the land forming a large portion of the proceeds of the capital stock, also upon the personal property being the residue of the proceeds, as well as the stock itself, it would have presented very much the appearance of a double taxation.

Judgment.

BURTON,
C.J.O.

Some recent decisions seem to reverse the law as it has so long existed, and a new question has now arisen as to this property which was formerly exempt, making it liable to assessment as real property belonging to the company, instead of personal property as to which they enjoyed an easement over the lands of the municipality or other owners, but still personal property for which they were assessed in another form.

The company have felt themselves bound by those decisions, and are appealing only on the ground of the mode of valuation resorted to, involving a subordinate question, in consequence of its poles and wires as real property being necessarily assessed separately in each ward, and not as a whole, as if it were a going concern, and the principal question has arisen as to what is meant by estimating the property at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor.

The fact that if treated as real property it must be so separately assessed, furnishes to my mind an additional reason against any such construction as that to which the recent decisions would seem to point, but the circumstance that the assessment must in law be so made must, I think, affect the valuation in the particular ward. If the company were satisfied with the valuation in the other wards, and paid their taxes accordingly, that valuation and payment would be conclusive. They might then be called upon to pay the assessment in this ward, although assessed upon a principle wholly erroneous, and upon the assump-

Judgment.

BURTON,
C.J.O.

tion that it was valued as part of the whole works regarded as a going concern. I think that would not be correct, and might render the previous assessment and payment unfair and inequitable, but that being separately assessed it must be regarded for valuation separately as it stands in that ward if it were appraised in the mode pointed out in the statute; that is to say, at its fair market value if brought to sale in that way, apart from the rest of the work, but if I am wrong in that view I think the County Court Judges have not acted upon a correct view of the statute in making a deduction for wear and tear; in other words, as if they were taking stock, or a purchaser having been found they were asked to act as valuers between him and his vendors.

It seems to me that the result would not necessarily be the same as if the direction of the statute had been strictly followed, and that the company are entitled to that as of right, and that the County Court Judges were not entitled to resort to what they have regarded as an equivalent by valuing the whole as a going concern in good repair and first-class condition, making what the evidence perhaps establishes is a fair allowance for wear and tear, and then estimating what proportion of the works, poles and wires, are in that particular ward.

It is perhaps to be regretted that a change of this radical kind should not have been effected by legislation rather than judicial decision, and proper machinery provided for assessing under the altered circumstances, but I have been unable to convince myself that the mode resorted to was a compliance with the Act of Parliament, and that the company are entitled to our decision to that effect.

I am of opinion that as real property the poles, etc., are simply to be valued as they would sell irrespective of the fact that they form part of a going concern, and the valuation suggested by the appellants appears to be fair and reasonable.

OSLER, J. A. :—

Judgment.

OSLER,
J.A.

The poles and wires of the appellants have been assessed by the respondents as real property in a separate parcel on the assessment roll, and if they are real property that was properly done in compliance with the requirements of sec. 13, sub-sec. 4, col. 12 of the Assessment Act. The board of County Judges has held that these poles, wires, etc., are properly assessable as real estate, and having regard to the present state of the decisions on the subject I cannot quarrel with that conclusion. The question is whether, in fixing the amount at which the company should be assessed therefor, the board, sitting in appeal from the Court of Revision under section 84 of the Act, has regarded the provisions of section 28, which enacts that except in the case of mineral lands which are specially provided for, "real and personal property shall be estimated at their actual cash value, as they would be appraised in payment of a just debt from a solvent debtor." The board, speaking by his Honour Judge Snider, were of opinion that "it was impossible to keep 'the line' up to the condition in which it was when new, but thought it should be assessed as a 'going concern' in good repair and first-class condition at about 85 per cent. of cost when new." And the assessment on this head was reduced from \$24,700 to \$13,940, and, as so reduced, confirmed.

This case is another illustration of the practical difficulty in applying the provisions of the Assessment Act to a specific kind of property which until a very recent period was never supposed to be within their scope; and the assessment of which was probably never contemplated by the framers of the Act. Being, however, as must now be held to be the case, real property—wires, conduits, cables, etc., fixed on poles, sunk in the ground, or themselves set in the ground—they are taxable as such, but their special character or their value to the company under the special circumstances under which they belong to and are used by them, affords no reason for placing a higher taxable

Judgment.

OSLER,
J.A.

value thereon than that which the Act furnishes the means of estimating in the case of other real property, viz., their actual cash value as they would be appraised in payment of a just debt from a solvent debtor. To assess them, therefore, as the board has done, as "a line," "a going concern in good repair and first-class condition," appears to me to introduce elements of value quite inadmissible and improper to be considered, such as their value regarded in connection with the exercise of the company's franchise, or in connection with the value of the whole line operated by the company throughout the different wards of the city, or even outside it, the value of the line regarded as a complete system, and the business value of the articles to the company itself as a part of the means whereby they exercise their franchise, or their income producing value. In each ward it is the things themselves, no doubt in their present situation as in point of law real property, but in fact the poles, wires, conduits and cables, which are to be taxed—the things which in default of payment of taxes the city might sell to a purchaser *qua* poles, wires, etc., but which, if so sold, or appraised in payment of a just debt from a solvent debtor would have to be removed and taken away by the creditor or purchaser.

There is no more reason or authority for valuing these things as "a line" or part of "a line," or as a "going concern," than there would be for valuing the roadway of a railway company in that manner under section 31. The franchise of the company cannot be taxed or sold by the municipality, nor their property taxed or sold carrying with it any corporate rights of the company to the purchaser. It is the property itself, whether real or personal, which is to bear the burden of taxation, and circumstances which may make it of an adventitious value to its possessor only, but which must necessarily cease to attach to it if it passes into other hands, must be excluded in estimating its cash value under section 28.

The case of *Albany and Schenectady R. W. Co. v. Osborn* (1851), 12 Barb. 223, cited by the appellants, and

which will be more fully referred to by my learned brother Moss, is apposite to the case in hand, and supports the view I have endeavoured to express.

Judgment.
OSLER,
 J.A.

The appeal must, therefore, be allowed, and as an estimate of the proper value to be allowed, and the amount for which the appellants ought to be taxed for the property in question, I think the figures proposed by them, \$3,488.40, are substantially right and should be adopted. The certificate of this Court allowing the appeal will direct the board to adopt those figures and to correct the assessment roll accordingly.

Moss, J. A. :—

The assessment under review in this appeal is that made in ward No. 2, wherein the principal buildings of the company are situate.

The poles, wires, conduits, etc., of the company in that ward have been assessed as real property. Snider, County Judge, speaking for the board of Judges says that he is of opinion that all the company's poles, wires, conduits and cables, are real estate ; and that appears to be the result of the recent decisions.

Being real property or estate they must be dealt with for assessment purposes in like manner as other real property.

They must be assessed in the ward in which they are. (Assessment Act, 1892, sec. 15.) And to them must be applied the same rule of valuation that is applied to other real property. X

Both sides agree that the rule of valuation to be applied is that prescribed by sec. 26 of the Assessment Act, 1892, now sec. 28 of R. S. O. ch. 224.

The property is to be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor.

The assessor is to act as an appraiser between a creditor and a solvent debtor in the circumstances stated. By

Judgment. what considerations should he be guided in forming his
Moss, conclusions as to the actual cash value to be attributed to
J.A. this particular parcel of real property ?

The rule which a jury or an arbitrator may apply in fixing the compensation to be made to an owner for lands taken from him compulsorily by a railway company, of taking into account their value to him because of his being compelled to sell is not applicable to the circumstances of this case. The owner may sometimes be entitled to greater damages for the conversion or destruction of property than its market value ; he may be entitled to damages for the consequential injury to other property or to his feelings, for interruption of business, or loss of health or comfort.

But in this case of taxation the property is to be appraised at its actual cash value.

It is certainly not unfair to the respondents to say that the meaning of actual cash value in the Assessment Act is the fair and reasonable cash price for which the property can be sold in the market.

In arriving at that price the appraiser is of course obliged to take into consideration all the circumstances, and to bear in mind what a purchaser buying, or a creditor taking the property for or on account of his claim, is to get, and the value it will be to him, when he gets it, either for his own use or as a saleable commodity.

Such purchaser or creditor cannot expect to acquire the property as part of and connected with other property which is not disposed of to him.

For the purpose of sale or transfer the property in question has to be separated in the purchaser's or creditor's hands from all connection with its present surroundings. It is a collection of poles, wires, conduits and cables, hedged in by the boundaries of ward No. 2, and disassociated from the rest of the system of which it now forms part.

To treat it for assessment purposes as part of a going concern is to give it a character not ascribed to it by the Assessment Act. It necessarily involves taking into consideration value given to it by its connection with other

property as well inside as outside of the ward in which the assessment is made.

The case of *Albany and Schenectady R. W. Co. v. Osborn* (1851), 12 Barb. 223, was decided with reference to enactments very similar to those in the Assessment Act, 1892.

By the law of New York (1851), it was provided that "all real or personal estate liable to taxation, shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor."

It was also declared that "the real estate of all incorporated companies, liable to taxation, shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals."

It was ruled by the Supreme Court of New York that under these provisions the real estate of a railway company liable to taxation must be assessed in each town at the actual value merely of that part thereof which lay within the town detached from the remainder of the road and without reference to the income or profitableness of the road.

The Court say (p. 225): "Under these provisions of the statute, * * * the duty of the assessors is a very plain one. They are simply to ascertain the value of the land, and of the erections or fixtures thereon, irrespective of the consideration whether the road is well or ill-managed, or whether it is profitable to the stockholders, or otherwise. Such property is to be appraised in the same manner as the adjacent lands belonging to individuals, and without reference to other parts of the railway. In estimating the value of an adjacent farm, it certainly would not be permitted to take into consideration the skill with which it was managed, nor the means by which high prices were obtained for the produce. These would change with every occupant, and perhaps with every year."

And again (p. 226): "The case submitted to us sets forth that in assessing the plaintiffs' land in Watervliet at \$250,000, the assessors have arrived at such valuation by

Judgment.

Moss,
J.A.

Judgment.

MOSS,
J.A.

estimating the entire worth of the plaintiffs' road, considering the lucrativeness and income thereof, and taking the proportion of said worth that the length of the said road in the town of Watervliet bears to the whole length thereof. And the case further states that the 'actual value' of that part of the plaintiffs' railway, including the land on which it is laid, and the fixtures connected with the same, lying within the said town, and detached from the remainder of the road, does not exceed \$60,000. The latter valuation is undoubtedly the correct one. It is the 'actual value' of the land which the defendants are required by the statute to ascertain."

The municipality in that case does not appear to have been divided into wards, and the distinction drawn was between the property of the railway company situate inside and outside of the town, but it seems plain that the result would have been the same if the assessment had been in a ward.

And very slight verbal changes are required to make the language I have quoted most apposite to the case before us.

The same view of like provisions in the California Code was taken by the U. S. Circuit Court of the District of California in *Huntington v. Central Pacific R. W. Co.* (1874), 2 Sawy. 503.

And I see no reason for applying a different rule when assessing this company's poles, wires, conduits and cables, as real estate in the wards of the city of Hamilton.

MACLENNAN, J.A., concurred.

Appeal allowed.

R. S. C.

IN RE JENISON AND KAKABEKA FALLS LAND AND
ELECTRIC COMPANY.

Arbitration and Award—Arbitrator—Refusal to State Case.

When questions of law arise in the course of arbitration proceedings any party thereto may apply to the arbitrator under section 41 of the Arbitration Act, R. S. O. ch. 62, to state a case for the opinion of the Court, and in the event of his refusal may apply to the Court to compel him to do so.

The application may be made before the arbitrator gives a ruling on the questions of law, and the making of an order is in each case a matter of judicial discretion, the order granting or refusing the direction to the arbitrator being subject to appeal.

On the merits the judgment of ROBERTSON, J., refusing to order the arbitrator to state a case, was affirmed.

THIS was an appeal by the company from the judgment of ROBERTSON, J. Statement.

The following statement of the facts is taken from the judgment of OSLER, J. A. :—

By an agreement bearing date the 21st of April, 1896, made between the Commissioner of Crown Lands, representing the Provincial Government, of the one part, and Edward Spencer Jenison, of the other part, after reciting that Jenison had submitted to the Government a scheme for the development of the water power of the Kaministiquia River in the vicinity of Kakabeka Falls, in the said river, for the purpose of constructing works for the development of electric power, and in order to carry it out and to complete the water privilege, had applied for a grant of certain lands, and for certain powers and privileges connected therewith, the Government agreed to grant to Jenison a license to use or flood part of lot A., concession 1, township of Conmee, containing thirty-eight acres, as shewn on a plan or survey thereof on record, and as described in the agreement, subject to forfeiture on failure by Jenison to perform certain specified stipulations, viz., within three years to construct on lot 20, concession D, Paipoonge, works, that is to say, dams, flumes, channels, etc., sufficient to produce 5,000 horse power of electric

Statement. power or energy, and to put in and keep supplied electric machinery sufficient to create for use and distribution at least 1,000 horse power of electric power or energy to supply to customers, and as much more machinery as will create and supply 25 per cent. more electric power or energy than there may be customers or demand for at all times thereafter; and to furnish this power to consumers on the basis of such tariff per horse power as the Lieutenant-Governor-in-Council may approve.

It was a further condition that Jenison should so construct his works that there should pass over Kakabeka Falls at least 4,000 cubic feet of water per minute at all times, and that if at the end of three years, or such further time as the Government should allow, he should not have "finished and made available for use the said number of horse power as above," he would forfeit and surrender to the Crown all the lands he might have acquired in connection with the development of the water power, and the rights granted by the agreement should be void. By the same agreement certain other rights and privileges over other property of the Crown were conferred upon Jenison which need not be referred to in detail, and it was lastly thereby witnessed that Jenison agreed within six months after the completion of all necessary rights and titles at once to proceed with the specified works, and to complete the same in all respects to the satisfaction of the Lieutenant-Governor-in-Council within three years from the date of the agreement, or within such further time as might be allowed, in default whereof the agreement might be cancelled, and all land privileges and other rights which Jenison should have acquired thereunder should be absolutely forfeited.

Soon after this agreement was made, Jenison, in proceeding to lay out his works and develop his water privilege, considered it necessary to acquire a part of lot No. 10 X in the township of Oliver, the property of the contestants, the Kakabeka Falls Company, and being unable to acquire it by purchase, attempted to expropriate it by

proceedings under the Act respecting Water Privileges, now R. S. O. ch. 141. This Act was held not to apply to his case, and acting as it would seem upon a suggestion thrown out by the Court, he appealed to the Provincial Legislature for and obtained a special Act, 60 Vict. ch. 106, passed 13th of April, 1897, intituled "An Act to enable Edward Spencer Jenison to develop and improve a water privilege on the Kaministiquia River." Statement.

Under this Act arbitration proceedings were taken before J. A. Proctor, Esq., official arbitrator for the city of Toronto, to fix the value of Jenison's interest, and in the course of the proceedings the arbitrator was asked to state a case for the opinion of the Court upon the questions stated below as to the admissibility of evidence.

Upon his refusal to do so an application was made to the Court, and was on the 1st of March, 1898, dismissed by ROBERTSON, J.

The appeal from his judgment was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 19th and 20th of May, 1898.

S. H. Blake, Q. C., and *W. Cussels*, Q. C., for the appellants.

Johnston, Q. C., for the respondent.

June 18th, 1898. OSLER, J. A. :—

Before advertng more particularly to the provisions of the Act, 60 Vict. ch. 106 (O.), it may be well to consider the nature of the contestants' application, and I may premise what I have to say as to this by the observation that the provisions of the Arbitration Act apply, by force of sections 47, 48, to the arbitration in question, as the Act under which it takes place was passed before the commencement of the Arbitration Act, which was the 1st September, 1897, and the arbitration was not then pending, but was commenced thereafter.

Judgment.

OSLER,
J. A.

Section 41 of the Arbitration Act enacts that the arbitrator may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court, any question of law arising in the course of the reference.

"The policy of this section," as Lord Halsbury observed in *Tabernacle Permanent Building Society v. Knight*, [1892] A. C. 298, in reference to the corresponding section of the English Act, "is very manifest. During the progress of an arbitration it may be seen that the arbitrator has mistaken the law, and is about to act upon his error, and the power of putting him right used to consist in the right of either party to revoke the submission to arbitration. That power has been greatly controlled by legislation, and now it may be extremely difficult for a party to make such a case to a Court as will induce them to make an order giving leave to revoke unless a case is stated."

It is not, however, a condition precedent to the right of the party to have a special case stated under the section that the arbitrator shall have indicated how he is about to decide the point of law raised or intended to be raised: *In re Spillers and Baker*, [1897] 1 Q.B. 312. The jurisdiction of the Court is consultative only, and their decision is obtained simply for the guidance of the arbitrator as to the course he should pursue on the reference in dealing with legal questions which arise therein: *In re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q.B. 613, where the distinction between a special case stated under this section and an award in the form of a special case is pointed out. And *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q. B. 131, clearly shews that it is the right of the parties to an arbitration to apply to the Court for an order directing the arbitrator to state a special case under the section, and that if he refuses to comply with a request made to him in good faith to state such a case, or to delay his award until the party can apply to the Court to compel him to do so, he is *prima facie* guilty of misconduct within the meaning of section 12 of the Act, and his award would, in such case, be liable to be set aside.

The exercise of the power thus conferred upon the Court to compel the arbitrator to state a special case is, however, from its nature, and indeed by the very terms of the section, discretionary, having regard to all the circumstances of the case. The Court may think it a case in which the arbitrator needs no advice, as for example, if they coincide with the view which the arbitrator may have expressed upon the points raised ; and there may be other reasons for declining to exercise the power. Nevertheless, whether the power be, or be not, exercised, the order of the Court or Judge granting or refusing the application, differing in this respect from the decision of the case itself if granted, is subject to appeal.

Judgment.

OSLER,
J.A.

After a careful consideration of the terms of the Act, and comparing them with those of the agreement between Jenison and the Crown, I am of opinion that in so far as the rights of the parties between themselves are concerned it is the Act which is to govern, and that in the determination of those rights by the arbitrator he is not controlled by the agreement. The question, therefore, of the capacity of the works which Jenison bound himself to construct within the period limited by the agreement seems to be one of little or no importance, further, at all events, than it indicates what is the minimum capacity of the works, which, I agree with Mr. Cassels, was no more than 5000 horse power. He was not, however, as I read the agreement, prevented from making his works of as much larger capacity as the concessions granted him would admit of. The 1000 and 25 per cent. additional horse power which the agreement also refers to, seem to me to relate merely to the electric machinery for actual production and distribution of that quantity of electric power or energy which were required to be put in and maintained, though I confess I find it difficult to understand what is exactly aimed at by the 25 per cent. additional horse power.

Within the scope of section 16 the question of the quantity of horse power which Jenison may produce or require seems, however, to be left entirely at large.

Judgment.

OSLER,
J.A.

The questions of law in respect of which the arbitrator was asked to submit a special case are said to arise under sections 16 and 19. The arbitrator declined to submit a case, and he has been upheld in his refusal by Robertson, J. Unless we should think that the tribunal whose duty it would be to decide the case if granted might reasonably take a different view of those sections from that taken by the arbitrator, the judgment appealed from ought not to be interfered with.

The main object of the Act as is manifest from the preamble is to enable Jenison to improve the water privilege he has acquired under the agreement of the 21st April, 1896, by diverting the waters of the Kaministiquia River and its tributaries from the natural channel of the river at the point on the river mentioned in section 2, and conducting them thence through and across the appellants' lot 10 X and other lands already controlled or acquired by the respondent, and discharging them again into the natural channel below the appellants' lot: section 7.

Sections 8, 9 and 10, empower the respondent to create storage reservoirs above the point of diversion.

The right to divert the water in this manner is, however, subject to the provisions, variously expressed in sections 1, 7 and 11, that only so much may be diverted as may from time to time exceed 4,000 cubic feet per minute passing the point at which it may be diverted: section 2; or, that the respondent shall at all times permit and allow at least 20,000 cubic feet of water per minute to flow over the present natural channel of the Kaministiquia River past any point therein between the point of diversion and the point of return: section 7; or, that a sufficient amount of water shall be allowed to flow down and over the channels of the said rivers, *i.e.*, the Kaministiquia River and its tributary the Mattawin, to insure a constant flow of at least 4,000 cubic feet per minute in passing over the Kakabeka Falls in the Kaministiquia River, a point opposite the appellants' property.

Subject to this and subject to whatever may be the

rights of the appellants under section 19 of the Act, it appears to me that the respondent, if he becomes entitled to divert the water at all, is entitled to use all the waters thus stored and diverted for the purposes of his water power just as he might be entitled to use them if they were not diverted at all, in which case, as we see by the agreement he had entered into with the Government, he had already stipulated that he would so construct his works that there would pass over Kakabeka Falls, and therefore past the property of the appellants and the chain reserve along the river side, at least 4,000 cubic feet of water per minute at all times.

The exercise of the power thus to divert the water depends, however, upon the respondent's ability to expropriate for the channel a part of lot 10 X, under the provisions of the Act, for the 16th section declares that before he shall be entitled to do so, the arbitrator shall determine "whether sufficient horse power for the purpose of supplying electricity to the towns of Port Arthur and Fort William, and other purposes for which electric power will, in his opinion, be required presently or within a reasonable period of time in the future at or near the said Kakabeka Falls, or the said towns, or along the Kaministiquia River between the said towns and the falls, can be supplied by Jenison by the construction of electric works on the property owned by the said Jenison, or which can be obtained by him at a reasonable price at or near Ecarté Rapids lying above lot 10 X, and so that the waters taken shall be returned to the river before it reaches said lot 10 X, and in case the arbitrator determine that sufficient horse power can be obtained at or upon such last (*qu.* first) named locality, then said Jenison shall not be entitled to exercise any rights of expropriation in regard to lot 10 X aforesaid.

In other words, in short, if Jenison can get sufficient power for his purposes by the erection of works on his own land above that of the appellants the right to expropriate does not arise at all.

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

The questions of law which it is said ought to be submitted by the arbitrator under this section appear to relate altogether to the character of the evidence which the arbitrator ought to require in order to satisfy him that the conditions exist which enable the respondent to expropriate. The appellants contend, if I rightly understand them, that the arbitrator is bound to form an opinion whether the respondent's scheme is a practicable one; that he is to enter into such questions as the cost of production of the power, and the price at which it can be furnished; that the respondent must shew actual contracts for user at the present time; that he must actually have constructed his works, such as storage dams, etc., or such of them as can be erected above lot 10 X, etc.

Most of these considerations seem to me to have been proper for the Legislature rather than the arbitrator. The former has declared that it is proper and just, and that it will conduce to the public good, that the respondent should be allowed to develop and improve his water privilege, and it is not for the arbitrator to say whether the scheme is practicable or not. He must ascertain under section 16:

(1) What quantity of horse power can be supplied by Jenison, and this means supplied at the points of distribution, not merely generated at the wheel by the construction of works on his own property above lot 10 X, and without the additional power which would be obtained by diverting the waters of the river through that lot. Then he must determine:

(2) Whether that quantity would be sufficient (a) for the purpose of supplying electricity to the towns of Fort William and Port Arthur, and (b) other purposes for which electric power will, in his opinion, be required presently or within a reasonable time in the future, at or near the points and places mentioned in the section.

Both these clauses are wide and elastic in their terms. The latter in particular looks to the future, and embraces probabilities arising from the anticipated growth and

development of the district. The determination of this second question is necessarily entrusted to the judgment and opinion of the arbitrator. The question is one of the sufficiency of the supply for the probable demand, and whether the former can be furnished without resorting to the power of expropriation. This is evidently from section 21 to be ascertained before the erection of the works.

These are really questions of fact, and I can see no ground for thinking that the arbitrator is taking a wrong view of the nature of the evidence on which they ought to be determined.

The next question arises upon the 19th section of the Act: "In case the arbitrator determines that the said Jenison should be authorized to expropriate any portion of the lot 10 X, he shall also determine and fix by his award the minimum quantity of water which shall at all times flow over the Kakabeka Falls, so as to protect as far as practicable the rights of the company as owners of a water privilege on the said river below that of the said Jenison."

The question here raised by the appellants is whether, upon the true construction of the Act, if the arbitrator finds the respondent entitled to expropriate part of lot 10 X for a channel for the diversion of the waters of the river and the stored waters above that point, he should not also find and determine what quantity or volume he may so divert in order to produce the horse power required for the purpose of his undertaking under section 16, and whether all the water beyond or in excess of such quantity should not, as the appellants contend, be allowed to flow over the falls as the minimum under section 19.

This contention appears to me to be founded upon an erroneous view of the rights conferred upon the respondent by the Act. As I read sections 2, 7, 8, 9, 10 and 11 of the Act he is given the right to use the whole of the stored and diverted waters: minus the 4,000 cubic feet per minute which must be allowed to flow over the natural channel between the points of diversion and return and over the falls, just as he might have used the waters had

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

he not succeeded in acquiring the right to divert them through lot 10 X, and had been confined to his rights under his agreement with the Government. Nothing in sections 16 or 17 of the Act authorizes the arbitrator to impose any limit upon the volume or quantity of water which may be diverted through lot 10 X, if the right to expropriate part of it arises. Section 19 may at first sight seem rather inconsistent with the other sections which provide that there shall be a minimum flow of 4,000 feet through the channel and over the falls, leaving it apparently to the arbitrator to fix a different minimum, but when its object is considered it is susceptible of an interpretation which harmonizes it with the rest of the Act. It was conceded that the minimum flow is the measure of the appellants' water privilege, and that would seem to have been arbitrarily assumed both in the agreement and in the other sections of the Act to be in the natural state of the river as much as 4,000 cubic feet per minute. But the arbitrator is to determine and fix by his award what shall in the event of expropriation be the sum, "so as to protect as far as practicable the rights of the company as owners of a water privilege on the river below that of Jenison." This, in my opinion, means that while having regard to the other sections of the Act there must not be less than 4,000 cubic feet of water at all times, the arbitrator may enquire and determine whether the water privilege of the company was in fact in respect of a greater minimum than that which had already been fixed; and if that were the case he might fix by his award the real minimum, whatever that was, above that quantity. This view derives force from section 21, which provides that in the event of the arbitrator determining that Jenison is not entitled to expropriate, or, as it is loosely expressed, "that the electric works should be erected by Jenison above lot 10 X," he shall also determine what benefit the company will derive therefrom in case they use the water, having regard to the quantity they could obtain without the additional works, and the quantity they use in excess of the last

mentioned quantity, and for the use of this extra quantity the arbitrator is to fix "the value to be paid by the company" when they so use it, estimated either in bulk or horse power. It would thus appear that the company would not, if Jenison erected his works at Ecarté Falls above lot 10 X, be entitled to use the waters stored so far as they increased the flow above the minimum of 4,000 cubic feet per minute, or perhaps even above the merely natural flow if it were less than that quantity, without compensating Jenison for the advantage they might derive from the extra flow.

Agreeing, therefore, with the view which the arbitrator has expressed as to his duty under section 19, there can be no need to direct a special case to obtain an opinion for his guidance under that section. The result is that the appeal must be dismissed.

BURTON, C. J. O.:—

Even if I entertained more doubt than I do as to the propriety of the conclusion arrived at by the learned arbitrator as to the extent of his powers, and of the questions dealt with by him being questions of fact, and no question of law having arisen necessitating the stating of a special case, confirmed as that conclusion has been in the carefully considered judgment of the learned Judge, I should in a matter so largely discretionary hesitate long before venturing to reverse his judgment, but I may say that I entirely agree that no proper case has been made out for our interference, and that looking at the nature of the powers given by the Act, and the large discretion vested in the arbitrator, and the short period given by the Legislature for carrying out the important works contemplated by the agreement, it would require a very strong case to induce us to interfere. If I am wrong in this view, the contestants will not be greatly the sufferers, as the award will still be liable to be set aside if open to the objections raised by the contestants, and, without entering

Judgment.

OSLER,
J. A.

Judgment. therefore more into detail, I will simply add that I entirely agree with the views expressed by my brother Osler, and in dismissing the appeal.

BURTON,
C.J.O.

MACLENNAN, J. A. :—

I agree.

Moss, J. A., took no part in the decision of the case.

Appeal dismissed.

R. S. C.

LANGLEY V. MEIR.

Bankruptcy and Insolvency—Assignments and Preferences—Landlord and Tenant—Rent—Acceleration Clause—"Current Quarter"—58 Vict. ch. 26, sec. 3, sub-sec. I. (O.).

By a lease made on the 31st of October, 1895, certain premises were demised for a term of three years from the 1st of November, 1895, at a yearly rent of \$480, payable, in advance, in even portions monthly on the first day of each month, the first payment to be made on the 1st of November, 1895. The lease contained the usual statutory covenants and provisoes, and an express power of entry and distress for rent in arrear, and also the following provision :—"If the lessee shall make any assignment for the benefit of creditors * * the then current quarter's rent shall immediately become due and payable." On the 31st of January, 1896, the lessor, who also held a chattel mortgage on the goods on the demised premises as collateral security for the payment of certain indebtedness of the lessees, took possession both as mortgagee and by way of distress for rent in arrear, only \$40 having up to that time been paid to her on account of rent. On the same day the lessees made an assignment for the benefit of creditors and by consent the goods on the demised premises, which were of far more value than \$200, were sold by the lessor and were removed from the demised premises before the last day of February. The lessor retained out of the proceeds of the goods \$200, rent for December, 1895, and January, February, March and April, 1896 :—

Held, per BURTON, C.J.O., and MACLENNAN, J.A.—That sub-sec. 1 of sec. 3 of 58 Vict. ch. 26 (O.), now R. S. O. ch. 170, sec. 34, sub-sec. 1, is a restrictive provision, and limits the landlord's lien even though in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provision, and that it does not give to the landlord an absolute right to three months' rent upon an assignment for the benefit of creditors being made.

Clarke v. Reid (1896), 27 O. R. 618, disapproved.

Per BURTON, C.J.O.—That the acceleration clause in the lease in question had no application, though even if the words "current quarter" could

be read "current three months" the clause would not help the lessor, as the current three months ended on the 31st of January, 1896; but that a lessor apart from an acceleration clause is entitled to the rent, not exceeding three months' rent in advance, which becomes in arrear while the assignee remains in possession and while there are sufficient goods on the demised premises subject to distress, so that in this case the lessor was entitled to the rent which fell due on the 1st of February, 1896.

Per OSLER, J.A.—That the acceleration clause in the lease had no application, but that if it had, then a quarter's rent became in arrear under it within three months after the assignment for the benefit of creditors and while the assignee was in possession and there were sufficient goods upon the demised premises subject to distress, so that the lessor would be entitled to the amount claimed; but that apart from an acceleration clause a lessor is entitled to the rent which becomes in arrear subsequent to the assignment and for three months thereafter, whether there are goods subject to distress or not, so that in this case the lessor was entitled to the rent which fell due on the 1st of February, 1st of March, and 1st of April, 1896.

Per MACLENNAN, J.A.—That "current quarter" in the acceleration clause meant a quarter of a year, or three months, but that the clause did not avail in this case because the current three months ended on the 1st of February, 1896; but that a lessor, apart from an acceleration clause, is entitled to the rent, not exceeding three months' rent in advance, which becomes in arrear while the assignee remains in possession and while there are sufficient goods on the demised premises subject to distress, so that in this case the lessor was entitled to the rent which fell due on the 1st of February, 1896.

In the result the judgment of FALCONBRIDGE, J., allowing the lessor rent for the months of February, March, and April, was varied by disallowing rent for March and April.

THIS was an appeal by the plaintiff from the judgment of FALCONBRIDGE, J. Statement.

The plaintiff was the assignee for the benefit of the creditors of Cleave and Co., who carried on business as retail merchants at Owen Sound, and the assignment to him was made, pursuant to the provisions of R. S. O. (1887), ch. 124, and amending Acts, on the 31st of January, 1896. It was not shewn when it was assented to by, or came to the knowledge of, creditors, and it was contended that it had not been delivered till the 1st of February, 1896.

By indenture of lease made on the 31st of October, 1895, the defendant demised to Cleave & Co. the premises therein described for the term of three years from the 1st of November, 1895, at a yearly rent of \$480, payable in advance, in even portions monthly on the first day of each month, the first payment to be made on the 1st of November, 1895. This lease contained the usual statutory covenants and provisoes, and an express power of entry and

Statement. distress for rent in arrear, and also the following provision :
“If the term hereby granted shall be at any time seized or taken in execution, * * or if the said lessees shall make any assignment for the benefit of creditors * * the then current quarter's rent shall immediately become due and payable and the said term shall immediately become forfeited and void.”

On the 19th of November, 1895, Cleave & Co. made a chattel mortgage in the defendant's favour upon their stock-in-trade on the demised premises, to secure payment of a note held by the defendant. On the 31st of January, 1896, the defendant took possession both as mortgagee and by way of distress for rent in arrear, only \$40 having up to that time been paid to her. The distress warrant was not produced, or its terms proved. The stock-in-trade was sold by consent and removed before the last day of February, 1896, and the proceeds were received by the defendant, and this action was brought, nominally for an account, to test her right to rent for the months of February, March, and April, 1896, her right to rent for December, 1895, and January, 1896, being admitted.

FALCONBRIDGE, J., held in the defendant's favour, and the plaintiff's appeal from his judgment was argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 24th of March, 1898.

Shepley, Q. C., for the appellant. The Act, 58 Vict. ch. 26, sec. 3, sub-sec. 1 (O.), does not give the defendant the right contended for. It does not create any new or substantive right, but is intended to prevent a landlord from having more than three months rent in advance. The statute has been interpreted to be a restrictive one as far as arrears of rent are concerned, and the same construction must be given when rent in advance is claimed. The cases are collected in *Linton v. Imperial Hotel Co.* (1889), 16 A. R. 337. *Clarke v. Reid* (1896), 27 O. R. 618, is against the appellant. But it proceeds on a fallacy. The statute does

not confer the lien but restricts the lien if it otherwise is contracted for. Rent must by the contract be payable in advance, and then there is a lien for three months' rent if the contract goes far enough. The acceleration clause in this lease is meaningless. Argument.

Walter Barwick, for the respondent. The assignment was not delivered and did not take effect till at the earliest the 1st of February, and the second quarter had then commenced and the acceleration clause, in which "current quarter" must be read "current three months," applies. Even without the acceleration clause there is a right to three months' rent. The preferential right exists apart from contract and is a beneficial provision in the landlord's favour. The object of the Act evidently is to give the landlord at least three months' rent upon an assignment being made. The three months clause was put in as an amendment, and was intended to compensate the landlord for the invasion of his rights contained in the same amending Act.

Shepley, Q. C., in reply.

June 30th, 1898. BURTON, C. J. O.:—

The lessee made an assignment for the benefit of creditors on the 31st of January, 1896.

The rent for November, 1895, had been paid, that for December, 1895, and January, 1896, was in arrear, and on the following day, that is to say, the 1st of February, 1896, another month's rent would fall due, and on the 2nd would be in arrear whilst the assignee was in possession, and there is, I fancy, no question that the landlord had a preferential lien for that. The question is whether under the acceleration clause or under sub-sec. 1 of sec. 3 of 58 Vict. ch. 26 (O.), any further lien can be claimed.

It is difficult to understand how a stipulation that a current quarter's rent shall in a certain contingency become due and payable can have any application to rent payable monthly. There is and can be no current quar-

Judgment.

BURTON,
C.J.O.

ter. It may at the first blush seem somewhat technical, but to make my meaning clearer, assume that the rent had been a yearly rent, payable half-yearly, with a similar stipulation that the then current quarter's rent should forthwith become due and payable, what could be seized upon to fill that definition? Under this lease there are two periods which could be described as current, the year and each month; but I do not think we are at liberty to say we will substitute three months for a quarter.

Even if the rent in this case had been payable quarterly, the position of matters in my view would have been this: The arrears on the 31st of January, 1896, were \$80; and the current quarter ending on the same day there would be nothing claimable under the acceleration clause. But on the 2nd of February, 1896, the assignee being in possession and there being goods liable to be distrained, another \$40 would be payable.

The landlord's right to distrain, apart from this statute and the repealed enactment for which it was substituted, subsisted for arrears due for six years, and it became a very serious consideration, therefore, where a tenant became insolvent whether his landlord should be allowed to permit his rent to run in arrear, and thereby to establish a preferential lien for large arrears to the prejudice of his other creditors; and the Legislature, in the earlier enactment, provided (as I think to prevent this apparent injustice) that in case of an assignment for the benefit of creditors this right, or preferential lien, as it is called, should be restricted to the arrears of rent due during the period of one year last previous to the execution of such assignment, and from thence so long as the assignee should retain the premises leased. That is, it restricted the right to distrain for arrears, but did not interfere with the ordinary right of the landlord so long as the assignee continued in occupation.

But landlords had long provided by agreement with their tenants for the acceleration of their rent in the event of an assignment for the benefit of creditors, and this prac-

tice, like the accumulation of arrears, was liable to abuse, and this, no doubt, led to the passing of the Act 58 Vict. ch. 26 (O.), by which the preferential lien is again restricted as far as the amount payable under an acceleration clause in case of an assignment is concerned, and there is the prohibition of an agreement to accelerate the rent becoming due for a longer period than three months.

It is, I think, a mistake to suppose that the Legislature in an unwonted fit of generosity to the landlord intended to confer any additional right or benefit on him in consequence of his being deprived of a good tenant suddenly. He was left to look after that himself, and very few leases in modern times are without an express agreement that in the event of insolvency the rent shall be accelerated for a longer or shorter period, and the Legislature has now interfered by limiting the period to three months; if they had intended to confer a right they would have used different language. If the lease does not contain such an agreement there is nothing to restrict, for it depends entirely on the agreement of the parties, and on nothing else.

There is not a word in the statute conferring any right but only words restricting those the landlord had at common law or under contract, and preserving to him his ordinary right of distress, or its equivalent—a preferential lien in the event of the assignee remaining in occupation.

I am of opinion, therefore, that the judgment should be reversed in part, and the landlord held not entitled to the accelerated rent for March and April, 1896. The fact that she has the money in her hands from the proceeds of the goods cannot affect the legal rights or liabilities of the parties.

It is not to be wondered at that the interpretation of this Act of Parliament should cause such a difference of opinion, but after giving the matter my fullest consideration I think it was simply intended to restrict the right to make agreements of the kind in question.

Judgment.

BURTON,
C.J.O.

Judgment. OSLER, J. A. :—

OSLER,
J.A.

The action is brought by the plaintiff as assignee for the benefit of the creditors of Cleave & Co. to recover moneys in the hands of the defendant, proceeds of sale of the goods of the insolvents under a chattel mortgage and under a landlord's warrant of distress for rent, and the question is really reduced to this : what sum the defendant is entitled to retain out of the moneys in her hands in respect of the rent reserved by the lease.

There seems to be no room for doubt as to when the assignment for the benefit of creditors took effect. It bears date and was executed by the assignors and assignee on the 31st of January, 1896, and though made neither to the sheriff nor to the plaintiff with the consent of creditors as prescribed by sec. 3 (1) of the Assignments Act, R. S. O., 1887, ch. 124, it was nevertheless by force of sec. 3 (3) valid except as against a subsequent assignment made in conformity with the Act. It is subject to the provisions of the Act unless and until such subsequent assignment should be made. No other assignment ever was made, and this was, therefore, valid without the assent of creditors testified by their execution thereof or otherwise.

The lease under which the present claim arises bears date the 31st of October, 1895, and is for a term of three years from the 1st of November, 1895, at a rent of \$480 per annum, payable monthly in advance in even portions on the first day of each month during the term : the first payment to be made on the 1st of November, 1895.

A clause in the lease provides that if the lessees shall make any assignment for the benefit of creditors "the then current quarter's rent shall immediately become due and payable, and the said term shall immediately become forfeited and void."

No question arises as to the gales due on the 1st of November and the 1st of December, 1895, or the 1st of January, 1896. The February gale, payable at any time up to the last moment of the 1st of February, would not

be in arrear until the 2nd of February, and therefore not until the second day after the execution of the assignment.

Judgment.

OSLER,
J.A.

The defendant claims (and has been allowed by the judgment appealed from) three months' rent, for February, March and April, 1896, by virtue either of the clause referred to, or of sec. 34 of the Landlord and Tenant's Act, R. S. O. ch. 170, which enacts, sub-sec. (1): "In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year last previous to, and for three months following, the execution of such assignment and from thence so long as the assignee shall retain possession of the premises leased."

With regard to the first ground on which the landlord's claim is rested I am unable to understand how a covenant that the current quarter's rent shall upon the execution of an assignment immediately become due and payable can have any application where the rent is reserved payable monthly. There can in such case be no "current" quarter's rent, any more than a current half year's or current nine months' rent with reference to the date either of the lease or of the assignment. The clause, which is part of the printed form, was evidently intended to fit a case where the rent had been reserved payable quarterly, not where it is reserved payable monthly in advance. "Current," in a clause framed as this is, seems to me to relate to the particular sub-division or aliquot part of the year for which a part of the rent is made payable. It might mean the rent for the whole of the year in which the assignment was made, or the balance thereof, had it been attempted to make the "current year's" rent become payable, the yearly rent being specified.

If I am wrong in this view, and the expression "the then current quarter's rent" may be read as meaning the rent for three months of the term, the defendant would be entitled to recover, because the three months' or current quarter's rent thus accelerated became due by reason of the assignment on the 1st of February, which under this lease

Judgment.

OSLER,
J.A.

was the first day of the quarter, rent being payable in advance, and was in arrear on the following day, and therefore within the period of three months following the date of the assignment at a time when there were goods on the premises sufficient to satisfy it, if it had been distrained for.

The landlord, however, can, in my opinion, rely only upon the statute, which is not happily expressed, and no construction which may be placed upon it seems free from difficulty. I doubt whether we are warranted in attributing to the Legislature the intention of dealing with the acceleration clauses sometimes found in leases, and of restricting the amount which by such clauses it may be attempted to recover. The section is very nearly in the same terms as those of sec. 121 of the Insolvent Act of 1865, sec. 81 of the Act of 1869, and sec. 74 of the Act of 1875, and sec. 28 (4) of the Landlord and Tenant's Act, R. S. O. 1887, ch. 143, the only difference which need be noticed being that which gives rise to the difficulty in the case, viz., that the words "and for three months following," i.e., following the execution of the assignment, are not found in any of those sections. They were first introduced into a new section 28 of the Revised Act of 1887 by 58 Vict. ch. 26, sec. 3, which is now section 34 of ch. 170 of the Revised Statutes of 1897.

Under sec. 81 of the Act of 1869, *Re Kennedy* (1875), 36 U. C. R. 471, was decided. The claimant sought to prove for arrears of rent as a privileged claim. It did not appear that there were any goods on the demised premises at the time of the assignment subject to distress. Hagarty, C. J., construing the section said: "There is no privilege or preference given to a landlord for rent over and above any other claim. His only protection seems to me to lie in his right and power to enforce a preferential lien on property on the demised premises for a year's rent"—afterwards by the Act 40 Vict. ch. 41, sec. 19 (D.), amending sec. 74 of the Act of 1875, reduced to arrears of rent due during the period of six months prior to the

assignment.—“The law does not allow property on the premises to pass into the hands of the assignee to the prejudice of the landlord’s lien on such goods.”

Judgment.

OSLER,
J.A.

In *Re Hoskins* (1877), 1 A. R. 379, decided on the Act of 1875, Patterson, J.A., said: “The right to distrain goods on the premises is, in my opinion, what is called in section 74 the ‘preferential lien of the landlord for rent.’ I think that section recognizes the right of the landlord to be paid his rent in preference to other creditors when there are goods liable to distress, and which at the time of the attachment or assignment he had a right to distrain, while it restricts that right to rent which accrued due within a year before that date.” The lease in that case provided that in the event of insolvency “the next succeeding current year’s rent” should also be at once due and payable. It was held that the landlord was entitled to a year’s rent as a preferred claim, but that the proviso was void as a fraud on the Insolvent Act, and that he could not prove for a second year’s rent.

In *Re McCracken* (1879), 4 A. R. 486, it was held that the landlord was not a privileged creditor, but was only entitled to a lien upon the proceeds of goods which, but for the Act, he might have distrained. I quote a passage from the judgment of Moss, C.J., which shews how the words in question were construed: “A creditor may, without any inaccuracy of expression, be said to have a lien upon goods, when he has a right to receive his debt out of their proceeds, or to prevent a disposition being made of them without payment of his claim. Full effect would thus be given to the words ‘preferential lien’ by holding the landlord entitled to be paid by the assignee out of the proceeds of the goods on the premises which, but for the assignment or attachment, would have been liable to distress, and making the year’s or six months’ rent a charge upon the proceeds in priority to the claims of other creditors.”

The judgment then goes on to point out that owing to the provisions of the 125th section of the Act, the effect of which was to prohibit the landlord from making a distress

Judgment.

OSLER,
J. A.

upon the goods of the insolvent after they had come into the hands of the assignee, the existence of the lien could not be dependent upon the actual levy of a distress, and the result of the decisions upon the Act was that to the extent of the goods which might have been distrained the landlord was entitled to be paid the amount of rent limited out of the proceeds of the goods.

Section 34 of the Landlord and Tenant's Act is derived from those sections of the Insolvent Acts dealt with in the above cases, and the expression "preferential lien of the landlord for rent," though now extended to arrears of rent subsequent to the assignment, and for which of course he could not distrain at the date of the assignment, is evidently used in the same sense as that which was given to it when used in the Acts from which it comes, viz., the landlord's right to be paid the rent allowed to him by the Act out of the proceeds of the goods on the premises. The larger remedy by distress remains open to him under the Ontario Act if the goods have not been removed, as they are not *in custodia legis* by virtue of the assignment, but if he does not exercise that right he is still entitled to be paid his rent out of the proceeds. Any other construction would practically enable the assignee to defeat the landlord's claim for the arrears of rent becoming due after the assignment by removing the goods, and even for the arrears previous to the assignment by removing the goods before the landlord lodged his distress warrant. Then as to what the landlord is entitled to. It is "arrears" of rent; and these are, first, any arrears which became due *during* the period of one year last previous to the assignment; rent, therefore, which was then in arrear and capable of being distrained for, though not necessarily covering the whole period up to that time, and in ninety-nine cases out of a hundred not doing so; secondly, arrears "for three months following"; rent, therefore, which becomes in arrear subsequent to the assignment and during the period of three months thereafter. For both he has the same preferential lien. Thus the gale of rent accruing, but not yet due at

the date of the assignment, would be recoverable if it became due and in arrear within three months thereafter, as well as any other gale which might become due and in arrear within that time.

Judgment.
OSLER,
J.A.

In the case before us the defendant is on this construction of the Act entitled to retain as against the assignee out of the moneys which lawfully came into her hands the proceeds of the goods on the premises at the date of the assignment, as well the arrears which were then due, as the gales of rent which became in arrear on the 2nd of February, the 2nd of March, and the 2nd of April, 1896, all within three months after the date of the assignment, the term created by the lease being still in existence, in all the sum of \$120, which has been allowed to her by the trial Judge, and which is the only sum in dispute upon the appeal. Had the assignee got the goods into his hands and sold them himself, this is what, in my opinion, the defendant would have been entitled to recover from him, and the defendant having got it as the proceeds of the goods sold under her chattel mortgage and distress warrant for other arrears of rent, is entitled to hold it.

The appeal ought to be dismissed.

MACLENNAN, J. A. :—

The question in this appeal is whether, either by virtue of the acceleration clause, or by virtue of the section of the Landlord and Tenant Act, 58 Vict. ch. 26, sec. 3 (1) (O.); or by the combined effect of both, the learned Judge was right in deciding that the defendant was entitled to three further payments of rent, amounting to \$120, as against the assignee.

The first question is what is the meaning of the words "current quarter" in the lease. The lease was for a term of three years, at \$480 per annum, but payable monthly, and I think "current quarter" must mean quarter of a year of the tenancy. The *habendum* is for three years from the first day of November, and the rent is pay-

Judgment. able on the first day of each month in each year during
 MACLENNAN, the term. The authorities shew that in such a case the
 J.A. anniversary of the day from which the term is to be computed is the last day of the term: *Ackland v. Lutley* (1839), 9 A. & E. 879; *McCallum v. Snyder* (1860), 10 C. P. 191; Woodfall, 15th ed., p. 161; Smith, L. and T., 2nd ed., p. 105; Redman on L. and T., p. 93. And it follows that the first day of February was the last day of the first quarter of a year; therefore, the first quarter of the tenancy was current when the assignment was made, and the acceleration clause had no effect, because the rent for the current quarter, being payable in advance, was all then due independently of that clause. It follows that the defendant could only have distrained for \$80 on the day the assignment was made, whether it was made on the 31st of January, or not until the 1st of February. Now what the statute says is that the lien is restricted to the arrears due during the period of one year last previous to, and for three months following, the execution of the assignment. It is restricted to *arrears due during* the year last previous, that is, as I understand it, the rent must have *fallen due* during the previous year, and not further back: *Mason v. Hamilton* (1872), 22 C. P. 190; and S. C. in Appeal, *ib.* 411. It seems to me, therefore, that so far as it depends on the first part of the clause the defendant only became entitled to \$80. But then the Act adds, "and for three months following * * and from thence so long as the assignee shall retain possession of the premises leased."

In *Clarke v. Reid* (1896), 27 O. R. 618, the learned Chancellor decided that under the Act a landlord is entitled to three months' additional rent whether the assignee keeps possession so long or not. The learned Chancellor does not consider the question very fully. It seems plain that the right cannot be absolute to three months' rent. Suppose that under the lease the term came to an end the next day after the assignment, it cannot be supposed that the Legislature meant to give the landlord three months' rent in such a case. The contrary seems evident, from sub-sec. 5,

which gives the assignee the option, notwithstanding any provisions in the lease, to retain the premises either for a part or for the whole of the *unexpired term*. Judgment.
MACLENNAN,
J.A.

It is contended for the plaintiff that the Act does not give an absolute right to three months' rent even when the term is one extending that far or farther, and that it is only where, at the time of the assignment, rent is due in advance, that the landlord can claim it preferentially, and then not beyond three months. In *Re McCracken* (1879), 4 A. R. 486, it was held in this Court, under the Insolvent Act then in force, that *preferential lien*, in the corresponding section of that Act, meant a right on the part of the landlord to receive his debt out of the proceeds of the goods on the demised land, in priority to the creditors.

That decision proceeded partly upon the 125th section of the Insolvent Act, which took away the landlord's right to distrain after the insolvency had taken place. The Assignments Act does not take away the right of distress after assignment, as we held in *Linton v. Imperial Hotel Co.* (1889), 16 A. R. 337. The landlord's preferential lien then must be his right to distrain upon the assigned goods upon the demised premises. If only a small part of the assigned goods are on the premises, his lien is confined to those goods, and does not also extend to the remainder of the assigned estate. As to the latter he is on the same footing as the other creditors. Now if the law had remained as it was before the Act of 1895, the defendant could not have claimed priority for more than \$80, because that was all that was in arrear when the assignment was made. The rent which fell due the next day was excluded although the goods were still on the premises. Then how does the amendment of the Act affect the matter? It is admitted that the goods were still on the premises on the 2nd of February, and inasmuch as the defendant could have distrained upon them, notwithstanding the assignment, for the gale which became in arrear on that day, the defendant got a preferential lien for that also. But she never had a lien for any subsequent gale, for there never

Judgment. was a time when she could have distrained for it, inasmuch
MACLENNAN, as the goods were sold before any further gale became due.
J.A. If by the terms of the lease, three months or more of the future rent was payable in advance, or was accelerated by the execution of the assignment, then the defendant would have had a preferential lien for future rent to the extent of three months, but no more, because she could have distrained for it. I conceive that the effect of the legislation is that the preferential lien depends on the right to distrain upon the assigned goods, and does not apply to rent in respect of which distress could not be made, as for example, in case of a lease containing a stipulation that the landlord should have no right of distress at all.

In my opinion, therefore, the defendant is entitled to the rent which became due on the 1st of February, 1896, in addition to the \$80 which was in arrear when the assignment was made, that is to \$120 altogether, instead of the \$200 which has been allowed to her by the judgment. She will thus receive rent to the end of February, by which time the goods were sold and were beyond the reach of distress as against the plaintiff.

Appeal allowed in part.

R. S. C.

KER V. LITTLE.

Easement—Right of Way—Prescription—Landlord and Tenant—Acknowledgment by Tenant.

After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription the tenant of the dominant tenement, without the knowledge of the owner, gave to the tenant of the servient tenement two pairs of shoes as consideration for the exercise of the right :—

Held, that even if an act of this kind could in any event affect the right that had been acquired the owner of the dominant tenement was not bound by what the tenant did without his authority.
Judgment of ROSE, J., affirmed.

THIS was an appeal by the defendant from the judgment of ROSE, J. Statement.

The action was brought for a declaration that the plaintiffs were entitled to a right of way over the defendant's land and for an injunction restraining him from interfering with their enjoyment thereof, and was tried at Berlin on the 2nd of April, 1896.

Judgment was given in the plaintiffs' favour on the 7th of September, 1897, and the defendant's appeal from that judgment was argued before BURTON, C.J.O., OSLER, and MACLENNAN, JJ.A., on the 28th and 29th of March, 1898. The points involved are stated in the judgments.

E. E. A. DuVernet, and *W. J. Millican*, for the appellant.

Aylesworth, Q.C., for the respondents.

October 4th, 1898. OSLER, J.A. :—

The plaintiffs fail to make title to the easement in question under the grant of the 25th of February, 1853, from McClaskey, the defendant's predecessor in title to lot C, over which the easement is claimed, to H. H. Date, the plaintiffs' predecessor in title to lot 2, because there was at that time an outstanding mortgage from McClaskey to a building society paramount to the grant, under the power

Judgment.

OSLER,
J.A.

of sale in which the mortgaged property was sold and the grant of the easement defeated. Date had in fact asserted and exercised a right of way over the *locus in quo* from the time he purchased lot 2, in 1851, up to the time he obtained for valuable consideration the grant referred to. He thereafter exercised it under the grant until the sale under the power, which took place on the 2nd of January, 1858. The latter must now be taken as the date from which the user of the way as of right began for the purpose of the prescription.

After a careful perusal of the evidence, I am of opinion that an open continuous enjoyment as of right of the way in question, substantially co-extensive with that which had been granted, is proved to have been exercised by Date and those claiming under him in lot 2, and as appurtenant to the parcels now held by the plaintiffs in that lot, from the last mentioned time up to within a few months of the commencement of the action. This user seems not to have been interfered with in any way before October, 1889, a period of nearly thirty-one years. The interruption, if it can be called such, which then took place was not yielded to, or was effectually resisted, and the user of the way continued until a few months (less than a year) before the commencement of the action, which was brought on the 10th of February, 1896, in consequence of a new act of interruption, to establish the acquisition of the right.

I consider that the learned Judge was justified by the evidence in finding that the easement claimed had been enjoyed openly and as of right, without any act of interruption acquiesced in or submitted to for a year, from January, 1858, to November or December, 1895. That is sufficient to entitle the plaintiffs to recover.

It was contended by Mr. DuVernet that the easement was one in gross, or a personal easement in favour of Date, and that the different periods of enjoyment by each successive owner could not be tacked to each other so as to make up the full period next before action necessary to

establish the acquisition of the easement; but to this I do not agree: Washburn on Easements, 4th ed., pp. 176-7; *Earl De la Warr v. Miles* (1881), 17 Ch. D., at p. 592. The right was exercised by Date from the first in connection with and for the purposes of his land in lot 2, the dominant tenement, and was continuously used by him, and those claiming under him in privity of estate, up to the commencement of the action, or within less than a year of that time; and it seems, moreover, to have been granted from time to time by one successive owner to another as a way appurtenant to those lands. An easement will never be treated as a personal one when it can be fairly construed to be appurtenant to some estate, which is undoubtedly the case here. ¶

Judgment.

OSLER,
J.A.

Something was also attempted to be made of the fact that one Roos, a tenant of part of the plaintiff Ker's land, had at some time in 1891 or 1892, given the tenant of lot C a couple of pairs of overshoes for permission to use the way on one or two occasions. But this was nothing more than a circumstance to be considered in determining what was the character of the user of the way throughout the whole period. Was it adverse and as of right, or was it by license and permission—a mere privilege? I think it would be attributing far too much importance to the fact referred to, occurring as it did after over thirty years uninterrupted user of the way, were we to hold it to overbalance the consistent evidence of continuous user as of right, which seems with this single exception, apparently unknown to the owner of the dominant tenement, to have prevailed from a period antecedent even to the year 1858 down to within a few months of the commencement of the action.

I refer to *Plasterers' Company v. Parish Clerks' Company* (1851), 6 Exch. 630; *Perrin v. Garfield* (1864), 37 Vt. 304; *Onley v. Gardiner* (1838), 4 M. & W., at p. 500; *Bright v. Walker* (1834), 1 C. M. & R. 211; 4 Tyr. 502; *Monmouth-hire Canal Co. v. Hartford* (1834), 1 C. M. & R. 614; 5 Tyr. 85.

I think that the appeal should be dismissed.

Judgment. MACLENNAN, J.A. :—

MACLENNAN,
J.A.

I think that the plaintiffs are entitled to retain their judgment.

Date acquired his title on the 17th of January, 1853, to a parcel about 80 feet in front on Main street by 202 feet deep, and this land overlapped lot C and abutted upon the rear line thereof to the extent of its full width of about 52 feet. At that time one McClaskey owned lot C subject to a mortgage for £200 to the President and Treasurer of the Galt Building Society, dated the 22nd of May, 1851, which contained a power of sale, without any notice, in case of default for six months in paying the mortgage money.

Shortly after acquiring his land on Main street, Date purchased from McClaskey a right of way over the south side of lot C twelve feet wide from Ainslie street in a direct line, and obtained a conveyance thereof, in consideration of £62 10s., bearing date the 25th of February, 1853. It was argued that this was a grant of a way in gross, but I think that is clearly not so, but that it was a grant appurtenant to the land on Main street which Date had lately acquired.

The evidence is clear that from that time Date and his tenants used and enjoyed the way which he had thus acquired for the purpose of taking in goods and supplies to the rear of the buildings erected on the Main street frontage, and, but for the mortgage which had been made by McClaskey, the plaintiffs' right to the way granted to Date as appurtenant to their lands would be beyond dispute. McClaskey's mortgage was registered, and McClaskey made default in payment, and by deed dated the 2nd of January, 1858, the officers of the building society sold and conveyed the land to one William Robinson, in consideration of the sum of £150. The effect of that was to put an end, not only to McClaskey's equity of redemption, but also to Date's right of way, for that was also subject to the mortgage. It does not appear when the last payment

of interest was made upon the mortgage beyond this that at the date of the deed there had been a default for six months; therefore the prescription on which the plaintiffs must rely cannot date farther back than six months before the 2nd of January, 1858, and perhaps not farther than the date of the deed itself. In either case the period is less than forty years before the action, which was commenced on the 10th of February, 1896.

Judgment.

 MACLENNAN,
 J.A.

The question then is whether the plaintiffs have enjoyed this way as of right without interruption for the full period of twenty years next before the action. The plaintiffs claim title under Date, and their respective titles were admitted at the trial, and their title deeds contain express grants of the right of way in question. Their rights, therefore, are the same as if Date were still the owner and had brought the action.

One defence which was relied upon was that the way which was used did not extend all the way from Ainslie street down to the rear of lot C, but that most of the time there was a deviation to the south from the line of way claimed before the rear of the lot was reached. I am of opinion, however, that the evidence greatly preponderates against that contention, and that the learned Judge was right in holding that the enjoyment was in a direct line to the rear.

The other defence relied on was interruption by a fence at the rear and a gate at the entrance at Ainslie street. The first interruption was in 1889, when the defendant acquired his title, and the other in October or November preceding the commencement of the action. The gate never was an effectual obstruction. It was never locked, and was never kept closed at any time except at night; and the fence erected in 1889 was only allowed to stand for a short time, at most only for two or three months, until it was broken down. The last obstruction also was only within a few months next before the action, and is, therefore, no bar to the plaintiffs' claim.

Another objection was made which affects Mrs. Ker

Judgment. alone. It is this, that about the year 1889, one Roos, a
MACLENNAN, J.A. tenant of Mrs. Ker, was induced by John Little and one
Joseph Saunders, who were agents for the tenant of lot
C, to give them two pairs of shoes as a consideration for
the privilege of using the way. It was not pretended that
this was done with the knowledge or consent of Mrs. Ker.
It is argued with considerable force that this put an end
to the easement. I am of opinion that the contention
cannot be maintained. At that time the easement had
been enjoyed for more than twenty years, and had become
such that Mrs. Ker, whose property it was, could have
maintained it by action if resisted or obstructed by the
defendant. The proposition is that this right has been
lost by the secret action of her tenant, and not by any
obstruction which she could have acquiesced in or could
have resisted. It is well established that there can be no
acquiescence without knowledge, and there was, therefore,
no acquiescence by which she is bound, and it is admitted
there was no obstruction. I therefore think it clear that
there was enjoyment by her as of right, without obstruc-
tion acquiesced in for as much as one year, for more than
twenty years next before the commencement of the pre-
sent action, and that her right is not affected by the secret
act of her tenant.

For these reasons I am of opinion that the judgment is
right, and that the appeal should be dismissed.

BURTON, C.J.O. :—

I am of the same opinion.

Appeal dismissed.

R. S. C.

GIGNAC V. ILER.

*Bankruptcy and Insolvency—Fraudulent Conveyance—Consideration—
Untrue Statement—Onus of Proof—Sheriff.*

THIS was an appeal by the plaintiff from the judgment Statement.
of a Divisional Court, reported 29 O. R. 147, and was
argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS,
and LISTER, JJ. A., on the 27th of September, 1898.

F. E. Hodgins, and *F. D. Davis*, for the appellant.

J. C. Hamilton, and *S. White*, for the respondents.

November 15th, 1898. The appeal was dismissed with
costs, the Court holding, on the evidence, that the deed
was void under the Statute of Elizabeth.

R. S. C.

GREAT NORTHERN TRANSIT COMPANY V. ALLIANCE
INSURANCE COMPANY.

Insurance—Marine Insurance—Vessel—Construction of Policy—Condition.

The defendants insured a vessel for a stated period, "whilst running on
the inland lakes, rivers and canals during the season of navigation, to
be laid up in a place of safety during winter months from any extra
hazardous building." At the time of the issue of the policy the
vessel was at a dock in inland waters and remained there unused,
though at all times in condition to be used, for more than two years,
when she was destroyed by fire, the policy having been kept in force :—
Held, per BURTON, C.J.O., and OSLER, J.A., that the risk did not
attach, the meaning of the policy being that the vessel was insured
during the season of navigation only while in commission :—

Held, per MACLENNAN, and MOSS, JJ.A., that the phrase in question was
used merely to limit the risk geographically and that the risk did attach.
Whether the words in question were descriptive of the risk, or a condi-
tion limiting the contract, considered.

In the result the judgment of ARMOUR, C.J., in favour of the plaintiffs
was affirmed.

THIS was an appeal by the defendants from the judg- Statement.
ment of ARMOUR, C. J.

The defendants were an insurance company and the
action was brought against them to recover the propor-
tion alleged to be payable by them of the value of a vessel
belonging to the plaintiffs destroyed by fire.

Statement. The defendants' policy was dated the 21st of August, 1894, and was in the ordinary form of a fire policy, the subject matter of the insurance being thus described in the body of the policy:—

“On the hull of the S.S. Baltic, including engines, boilers, and appurtenances thereto, anchors, chains, masts, spars, rigging, sails, cabin and office furniture, beds, bedding, linen, silver and plated ware, cutlery, china, glassware and earthenware, looking glasses, mirrors, wheelbarrows, trucks, clocks, and apparel, on board said steamer, whilst running on the inland lakes, rivers and canals during the season of navigation.

To be laid up in a place of safety during winter months from any extra hazardous building.

Ordinary outfit to be allowed in winter and spring.

It is understood and agreed that the steamer insured under this policy has permission to carry merchandise, hazardous and non-hazardous, as freight from port to port, with one barrel coal oil for steamer's use.”

The policy was expressed to be for one year, from the 14th of August, 1894, to the 14th of August, 1895, with a provision for renewal for each succeeding year upon payment of the premium.

The policy was duly renewed in 1895 and 1896, and on the 5th of September, 1896, the vessel was burned. At the time of the issue of the policy the vessel was laid up at a dock at Collingwood with all her engines, furniture, and fittings in her except a few sofas and some electric light apparatus which had been placed in another of the plaintiffs' vessels, and she remained at the dock in the same condition until the time of the fire.

The action was tried at Toronto on the 23rd and 24th of September, 1897, before ARMOUR, C.J., who gave judgment in the plaintiffs' favour. Subsequently by consent judgment was entered in the plaintiffs' favour in each of five other cases against other companies who had issued policies in the same form on the same vessel.

The appeals of all the companies were argued before *Argument.*
BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ. A.,
on the 5th and 6th of April, 1898.

W. Nesbitt, and *R. McKay*, for the appellants.

McCarthy, Q.C., *W. M. Douglas*, and *C. S. MacInnes*, for
the respondents.

October 4th, 1898. BURTON, C. J. O.:—

[The learned Chief Justice read the policy and continued :]

After a great deal of consideration and naturally with hesitancy, in consequence of the very strong opinion expressed by the Chief Justice, I have been unable to bring myself to the conclusion arrived at by him, and I do not think that any difficulty arises from the insurance being divided into two seasons—the summer, or season of navigation, and the winter, when navigation was not possible.

In neither case was the vessel insured generally and free from restriction of any kind. In the winter she was not to be laid up in close proximity to any extra hazardous building, and during the season of navigation she was to be in actual service, as I read the contract. I do not know, nor do I think it material to enquire, whether the risk when she was running, or when she was lying up idle, was greater, or less, or equal, that, as it appears to me, is a question of no pertinency in the construction of this written instrument.

In the way in which the case shaped itself at the trial, the services of the jury having been dispensed with except for the purpose of ascertaining the value of the property and the loss sustained, it must now, I take it, be assumed that the vessel, during the three years she was assured, never was in actual service; that she had not obtained a certificate of inspection, without which she could not navigate; and that the owners had no intention of obtaining one, and had no intention of running.

Judgment.

BURTON,
C.J.O.

I do not for a moment assume that if she were actually running for the season a delay of a few days for repairs or because business was slack would cause a forfeiture of the policy. If any such question as that had arisen the opinion of the jury would necessarily have had to be taken, but, assuming the facts to be as I have stated, did the policy ever attach, or can the Court reject the words I have quoted as surplusage and make in effect a new contract for the parties?

Whether the defendants would have undertaken a risk upon this steamer if laid up during the whole season of navigation, as well as the winter months, it is impossible to say, if so, they should have provided for it in appropriate words in the policy; that they have not done, and it possibly never suggested itself to the underwriters, although the plaintiffs should, I think, have been put upon their guard by the language employed.

It may be said the same thing might have occurred whilst the vessel was running and whilst she was moored at the dock merely for the night. That is true, but the answer to it is, that the insurance company assumed no such risk and we are not at liberty to make a new contract for them. I am unable to say what the premium for such a risk would have been, or, as I have said, whether they would have undertaken it at all.

I have written thus far upon the construction of the contract as it strikes me, without reference to the authorities. I think, however, there is much in *Pearson v. Commercial Union Assurance Co.* (1876), 1 App. Cas. 498, to sustain this view; and I quote from an American case, *St. Nicholas Ins. Co. v. Merchants' Ins. Co.* (1877), 18 N. Y. Sup. Ct. Rep. 108, in a case in which the learned Judge who delivered the judgment uses this language:—

“By its policy it insured the barge while running on the Hudson and East rivers. The term ‘running’ was evidently here employed in the sense ordinarily given to it, as it is applied to the business of navigation, and for that reason it could not have been intended that it should be

restricted to risks encountered only when the barge was in motion, but it was equally within the protection intended to be afforded by the policy while it was lying at the wharves it was obliged to resort to for the purpose of receiving and discharging its cargo. The term 'running,' as it was used by the defendant, must have been designed to include all that ordinarily would be comprehended by the business of a vessel in active employment."

Judgment.

BURTON,
C.J.O.

In the case of *Reid v. Lancaster Fire Ins. Co.* (1882), 90 N. Y. 382, a vessel which was insured as "while lying at anchor, or at any bulkhead, dock or pier," was beached, and whilst thus beached was burned, and it was held as a matter of law that the vessel was not at anchor within the meaning of the policy, and the plaintiff was not entitled to recover.

There was another point in that case which might, if it had occurred, have not been available as a defence, as it arose only on a condition which by our statute could not have been looked at, not being in compliance with our statute in reference to other than the statutory conditions.

But it is said that the clause "whilst running on the inland lakes rivers and canals during the season of navigation," if of any force in limiting or restricting the general nature of the insurance, is of force only as a condition in respect of the user of the vessel, and is not binding, not having been indorsed upon the policy in compliance with the provisions of the Ontario Insurance Act, as being a variation of, or an addition to, the statutory conditions. I am unable to agree in that contention. I could well understand that if this had been an insurance on this vessel or on a house generally, and the insurers had afterwards relied on a condition to the effect that if the house should be unoccupied or vacant for a certain number of days the risk should cease, that being a variation of the statutory conditions could not be resorted to unless the requirements of the statute had been complied with. But that is not this case; the policy describes and defines accurately and distinctly the precise risk they are willing to under-

Judgment. take, and the locality and user or occupation of the vessel
BURTON, form part of the definition of this risk; it is not the insurance
C.J.O. of the vessel generally for a certain time, but it is for the
insurance of her so long as she remains in a certain
locality, and so long as during the summer she was in
actual service and during the winter was tied up in a place
of safety. The existence of these things formed part of
the risk and was a condition precedent to the risk attaching
or any liability on the part of the insurers. I am of
opinion, I admit with regret, that the insurance company
are not liable upon these policies, but the plaintiffs ought
to recover back the premiums paid, and as they were not
tendered until after action commenced they should be
entitled to their costs in the appropriate jurisdiction in
which they might have been recovered and the appellants
should be entitled to the costs of this appeal.

OSLER, J. A. :—

The evidence shews that the vessel was laid up at the dock in Collingwood harbour in the fall of 1893, and that up to the time of the loss she was never again used or licensed to be used. It does not appear whether this was known to the defendants when they issued the policy or renewed it or until after the occurrence of the loss.

The policy then is a time policy for one year. The plaintiffs contend that the dominant words localizing the description of the risk are "the inland lakes, rivers and canals," an inland risk as contrasted with an ocean risk. The defendants say that this construction eliminates the words "whilst running," which, according to their contention, govern the whole clause relating to the insurance during that period of the year known and referred to therein as the season of navigation, during which, and on an inland lake, the loss undoubtedly occurred, though not while the vessel was running, that is to say, while engaged in navigating such inland waters.

Looking at the policy as a whole we see that the term

during which the vessel is to be insured is divided into two periods, one being the season of navigation and the other the winter months. During the latter she is to be laid up in a place of safety from any extra hazardous building, and of course the words "whilst running" cannot apply to that period. But if they have any force at all, if they are not merely superfluous words, they are capable of a very apt application to the other period as defining the risk which the defendants undertake during that period. The ship is not insured as lying in the dock and intended to navigate the lakes, as was the case in *Grant v. Ætna Ins. Co.* (1862), 15 Moo. P. C. 516, where the latter words were held not to constitute a contract or warranty that she should navigate as therein described, nor is the description simply "on the inland lakes during the season of navigation" nor even "running on" such lakes, which would probably have covered her though tied up at her dock and unemployed as she was throughout the whole time. The words are "whilst running on, etc." These import as it seems a risk of a different nature, whether greater or less than the other it is not for us to say, for it is in my opinion that only which the defendants agreed to undertake. They undertake to insure, not a vessel laid up during the season of navigation, but a vessel engaged or employed in navigating the inland lakes, rivers, etc. Except in that condition of events the insurance does not attach. The 3rd and 4th clauses of the part of the policy above quoted relating to the outfit and the carriage of merchandise, hazardous and non-hazardous, and coal oil, appear to me to point strongly in the same direction. It is not necessary to say that the policy would cease to attach whenever the vessel happened to lie up at the dock during the course of a voyage; on the contrary, I think that would not be the case. The following passage from the judgment of Daniels, J., in *St. Nicholas Ins. Co. v. Merchants' Ins. Co.* (1877), 18 N. Y. Sup. Ct. Rep. 108, 113, where the policy in question was on a barge "while running on the Hudson and East rivers," seems to me much in point:—

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

[The learned Judge read the passage already quoted, and continued:]

I refer also to *Reid v. Lancaster Fire Ins. Co.* (1882), 90 N. Y. 382; *Providence Washington Ins. Co. v. Corbett* (1884), 9 S. C. R. 256; *Pearson v. Commercial Union Assurance Co.* (1876), 1 App. Cas. 498; *Gorman v. Hand-in-Hand Ins. Co.* (1877), 11 Ir. Rep. C. L. 224-236.

I do not think it necessary to cite the cases upon marine policies in which, as it is said, any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever plan, to be construed as a warranty, and, *prima facie* at least, the compliance with that warranty is a condition precedent to the attaching of the risk. Here, I think, by the very terms of the clause describing the risk insured, unless the loss happened while the vessel was running, in the sense above mentioned, upon inland waters, the insurance did not attach and the plaintiffs cannot recover.

It was argued strongly by the learned counsel for the plaintiffs that this would be introducing a condition varying the statutory conditions contrary to the Insurance Act. I do not think so. It is not the case of a change material to the risk or a describing of the property insured otherwise than as it really is to the prejudice of the insured, or introducing a condition defeating a risk which has attached, as, for example, a condition that the insurance upon a building shall be avoided if the house becomes vacant. The real question is whether the risk attached at all, whether the thing lost was in the circumstances the thing insured.

This question must be answered in the negative, and therefore the appeal must be allowed.

The appeals in the actions against the other five companies must result in the same way. There are some unimportant differences in the language of the different policies, but it was not suggested that these could affect the construction to be placed upon the clause we have had under consideration in the *Alliance* case.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN,
J.A.

The insurance is “on the hull of the S.S. Baltic, etc., whilst running on the inland lakes, rivers and canals during the season of navigation. To be laid up in a place of safety during winter months from any extra hazardous building. Ordinary outfit to be allowed in winter and spring.” The whole of the foregoing, beginning with words, “on the hull,” are upon a form, mostly printed, inserted in the policy in the blank for the description of the property insured ; and the policy then goes on to say that if the property above described, or any part thereof, shall be destroyed or damaged by fire or lightning, at any time between the 14th of August, 1894, at 12 o’clock noon, and the 14th of August, 1895, at 12 o’clock noon, or at any time afterwards so long as the same shall be renewed, the company shall pay and make good the loss not exceeding \$2,500. The policy was duly kept renewed, and in September, 1896, the steamer was burned. At the date of the policy the steamer was laid up at the dock at Collingwood, with all her engines, furniture, etc., in her, except a few sofas which had been removed to another steamer belonging to the plaintiffs, and also her electric lighting apparatus, which had been similarly removed. In all other respects, however, the vessel was capable of being put in use as a passenger and freight steamer, whenever required. She had not, however, been employed during the season of 1894, and was not afterwards employed up to the occurrence of the fire. The defendants contended at the trial that because the steamer was laid up during the season of 1894, and afterwards until the fire, the insurance never attached, that the vessel was not burned whilst running as described in the policy. This contention was overruled by the learned Chief Justice, and hence the present appeal. After very careful consideration of the arguments addressed to us, I am of opinion¹⁷ that the learned Chief Justice put a correct construction upon the language of the policy. The contract and the premium

Judgment.
MACLENNAN,
J.A.

are for the whole year, and not merely for the season of navigation. Not only is that the express contract, but it is also implied from the words in the printed slip, "To be laid up in a place of safety during winter months from any extra hazardous building." It follows that the ship was to be covered all the year round, unless we find something in the policy to qualify or abridge that obligation. It is said that is done by the use of the words "whilst running on the inland lakes," etc. It was very fairly and properly conceded by counsel for the appellants, that these words did not confine the risk to such time as the steamer might actually be in motion, but that she was insured while at anchor or while lying at a dock taking in or discharging cargo or passengers, or perhaps for temporary repairs. What Mr. Nesbitt insisted on was that the ship must be in commission, as he frequently expressed it, that is, fitted up for running during the season of navigation with captain and crew, and having procured the annual government certificate, which would cover a lying up for repairs. But he also insisted that if laid up for the whole, or part, of the season of navigation, captain and crew discharged, she was no longer running within the meaning of the policy, and that in that case the insurance would cease, or not attach at all. The language in question is not perfectly clear, but the ship was a valuable property and insurable on some terms. In the winter months she was laid up, just as contemplated by the policy, and there being in the policy clear language insuring her for a whole year, any doubt or obscurity or ambiguity in the language tending to qualify or reduce the risk thus clearly expressed must be decided in favour of the plaintiffs and not of the defendants. The extent of the insurance being clearly expressed, any exception or qualification must be expressed with equal clearness. Now, while I think that if the meaning of the word "running," or of the whole phrase "running, etc., during the period of navigation," was doubtful, it ought to be held that the plaintiffs were insured, I also think that the meaning is

fairly clear in favour of the plaintiffs' construction, and that the whole phrase was intended to express, as decided by the learned Chief Justice, that the geographical region in which the steamer was employed, and was to be employed, was the inland lakes, rivers and canals, and not the ocean. I think that, reading both clauses together, that is, the clause relating to the summer months or period of navigation, and that relating to the winter months, the words "whilst running" apply to the winter months as well as the other. She was still a steamer running on the inland lakes, etc., while laid up in the winter, just as much as when lying at anchor or at a dock receiving or discharging cargo, that is within the fair and reasonable meaning of this policy, taking the whole of its language together. I think the case of *Pearson v. Commercial Union Assurance Co.* (1876), 1 App. Cas. 498, is quite distinguishable. In that case the language was clear; the vessel was insured lying in the Victoria docks, with liberty to go into dry dock. She left the Victoria docks, but did not go into dry dock, but in a different direction, and was burned while moored in the river undergoing repairs.

Judgment.
MACLENNAN,
J.A.

I also incline to think that having regard to the clear terms in which this ship was insured for a whole year, the exception or qualification of the risk so defined and expressed, which is here sought to be relied upon, is a condition within the statute, which should have been expressed as provided by section 115 of the Insurance Act, but it is unnecessary to rest the case upon that ground.

For these reasons I am of opinion that the appeal should be dismissed and that the judgment for the plaintiffs should be affirmed.

Moss, J. A. :—

In view of the opinion held by some of my learned brothers in this case I venture to express mine with great diffidence.

Judgment.

Moss,
J.A.

To me personally it has been a case of the greatest difficulty, but in the result I have come to the same conclusion as Chief Justice Armour and my brother MacLennan and substantially for the same reasons.

The appellants concede that the words "whilst running" cannot be read literally or in their primary sense of moving through the water and that under the policy there must be periods when the steamer would be at rest and still be insured.

Since we are not to apply the primary meaning we are at liberty to apply that meaning which appears most likely to give effect to the intention of the parties as shewn in the other parts of the policy.

And I think that may be best effectuated by reading the description of the property insured as not imposing the limitation or condition that the vessel was to be actually engaged in navigating the waters of the inland lakes, etc., during the season of navigation.

It is certain that the primary intention was to insure the steamer for the whole period of twelve months from the date of the policy and every renewal thereof.

And unless controlled by the words of the slip describing the property or articles insured, the steamer was insured in port and on the lakes, at all times and in all services, situations and circumstances. And not only the steamer or vessel itself but many other things in and about it.

It is argued that the words "whilst running on the inland lakes, rivers and canals during the season of navigation," makes the policy what is termed a localized time policy; that they are descriptive of the risk assumed rather than of the property insured.

But I think full effect may be given to these words by reading them as descriptive of some of the property or articles intended to be included in the risk.

The intention was to insure the steamer and all belonging to it and with that view the description of articles refers to nearly every kind of article which is ordinarily on board during the season of navigation. The whole is

an enumeration of the property or articles insured, viz., first the hull, then the outfit necessary to render the steamer fit for navigating the waters of the lakes, etc., and without which she would be unable to ply upon them, and lastly those articles which are usual and necessary to be in and upon a steam boat of her class during the season of navigation.

Judgment.

Moss,
J.A.

While the ordinary outfit might be deemed to be included in and covered by a general insurance upon the vessel it is doubtful whether the other articles would be covered if not specially enumerated: see Arnould's Law of Marine Insurance, 6th ed., pp. 18-21, *et seq.*

There is thus a sufficiently good reason for the enumeration of the articles "on board said steamer, whilst running on the inland lakes, rivers and canals during the season of navigation."

I am unable to see that the American decisions to which we were referred govern this case.

In *St. Nicholas Ins. Co. v. Merchants' Ins. Co.* (1877), 18 N. Y. Sup. Ct. Rep. 108, the policy was not for a year certain, but was expressly limited to such period of time as the barge in question was running on the Hudson and East rivers. The holding was that running did not exclude lying at docks, etc., and that was all that was called for upon the facts.

In *Reid v. Lancaster Fire Ins. Co.* (1882), 90 N. Y. 382, the policy, besides being expressly limited in similar manner, contained a further provision ending the risk "if the premises shall be vacated in whole or in part, and shall remain unoccupied for the space of twenty days." The Court pointed out that by the terms of this policy the risk was taken while the vessel was in use, or ready for use, and awaiting employment, or if laid up for want of it at least occupied (p. 386). It was recognized that she might be laid up for want of employment and still be insured, provided she was occupied.

In *Mark v. National Fire Ins. Co.* (1881), 31 N. Y. Sup. Ct. Rep. 565, the policy appears to have been upon a ferry

Judgment.

Moss,
J.A.

boat while running on the Hudson river. It was burned while tied up and not in actual use. The defendants did not contend that the policy did not cover such a contingency, but rested their defence upon the contention that they were not liable, by reason of a clause in the policy that it should be void if the risk should be increased by means within the control of the assured.

The Court ruled against the contention, and at p. 570, expressed the opinion that "running on the Hudson," did not mean a continuous employment, but embraced periods during which the vessel was tied up and not engaged in any way.

In the present case we have to begin with a general insurance for a year, and it lies upon the defendants to shew that the risk is limited to a shorter period by something not amounting to a condition. For if the words relied upon amount to a condition they cannot avail the defendants, because in that case the condition should be endorsed upon the policy in the manner required by the Insurance Act.

With great deference, I think the defendants have failed to make out their defence, and that the appeals in this and the other cases which stand or fall with it should be dismissed.

Appeal dismissed.

R. S. C.

CURRAN V. GRAND TRUNK RAILWAY COMPANY.

Railways—Omission of Statutory Duty—Dominion Railway Act, 51 Vict. ch. 29, sec. 289—Constitutional Law—Workmen's Compensation for Injuries Act—Master and Servant—Common Employment—Negligence of Fellow Servant—Executors and Administrators—Damages—R. S. O. ch. 166—Reduction of Damages—New Trial.

Section 289 of the Dominion Railway Act, 51 Vict. ch. 29, giving to any person injured by the failure to observe any of the provisions of the Act a right of action "for the full amount of damages sustained" is *intra vires*, and the limitation of amount mentioned in the Workmen's Compensation for Injuries Act does not apply to an action by a workman or his representatives under this section.

Where a statutory direction imposed upon an employer has not been observed it is no defence that its non-observance is due to the negligence of a fellow servant of the person injured.

The widow and child of a person killed in consequence of the defendants' negligence may, when letters of administration to his estate have not been issued, bring an action under R. S. O. ch. 166, without waiting six months.

Judgment of ROBERTSON, J., affirmed.

The Court thinking that the damages awarded by the jury in an action for causing death were excessive ordered that there should be a new trial unless the plaintiffs accepted a reduced amount.

THIS was an appeal by the defendants from the judgment of ROBERTSON, J. Statement.

The plaintiffs were the widow and infant child of one Charles O'Reilly Curran, who in his lifetime was employed by the defendants as a switchman, and while so employed was, on the 15th of March, 1897, fatally injured in consequence of his foot having been caught in an unpacked frog.

The action was brought on the 26th of June, 1897, asking \$20,000 damages.

In the statement of claim general allegations of negligence were made, and there was also an allegation that the provisions of the Workmen's Compensation for Injuries Act had not been complied with.

The action was tried at Hamilton on the 14th of January, 1898, before ROBERTSON, J., and a jury.

The following were the questions submitted to the jury and their answers thereto.

Statement.

1. Did the accident happen to the deceased by and through his own want of care and caution and by his careless and improper conduct in trying to uncouple the cars while they were in motion? No.

2. Did the accident happen to the deceased by reason of the frog not being packed according to the statute? Yes.

3. Was the personal injury of the deceased from which he died caused by any defect in the condition or arrangement of the ways, works, etc., of the defendant's railway? If yea, what was the defect? Yes; unpacked frog.

4. Did the deceased receive the injuries from which he died while in the discharge of his duties as a servant of the defendants and in consequence of the discharge by him of such duties? Yes.

5. Was the deceased guilty of contributory negligence? No.

We assess the damages at \$5,500.

Upon these findings judgment was entered in the plaintiffs' favour for \$5,500, \$4,000 to be paid to the widow and \$1,500 to be paid into Court to the infant's credit.

Letters of administration to the estate of Curran had not been applied for.

The defendants appealed, and the appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 25th of May and 3rd of June, 1898.

H. S. Osler, for the appellants. Subject to the decision of the Judicial Committee, the question of the defendants' liability for an accident resulting from an unpacked frog is concluded by the case of *Washington v. Grand Trunk R. W. Co.* (1897), 28 S. C. R. 184; but there are in this case further questions not settled in that one. This action is framed as an action under R. S. O. ch. 166 and under the Workmen's Compensation for Injuries Act. It cannot be supported under the former Act because it has been brought too soon, and if sustainable under the latter

Act the damages must be reduced. If section 289 of the Dominion Railway Act is intended to alter, or ignore, the scale of damages fixed by Ontario legislation it is *ultra vires*. It ought to be read as giving a right of action for damages to the full amount allowed in the forum where the action is brought. In any event the damages are excessive. Argument.

G. Lynch-Staunton, for the respondents. The judgment is right. Under R. S. O. ch. 166 the administrator, if there be one, has six months within which to bring his action, but if there be no administrator the persons beneficially entitled may sue at once. It is too late now to contend that the Dominion legislation is *ultra vires*. In the *Washington* case and in *LeMay v. Canadian Pacific R. W. Co.* (1890), 17 A. R. 293, judgment was given for more than \$1,500. Clearly, too, the Dominion Parliament must have jurisdiction. The nature of the subject matter shews this, and it would be absurd to admit that there is power to impose regulations and no power to punish for their breach.

H. S. Osler, in reply.

No counsel appeared for the Attorney-General for Canada or the Attorney-General of Ontario, although notice had been given to them.

November 15th, 1898. BURTON, C.J.O.:—

This case has been standing for some time awaiting the decision of the Judicial Committee in the case of *Washington* against the same defendants.

When that case was before this Court we were of opinion that, as section 262 was dealing with the same subject matter, viz., the packing in the way described, where by the section any space was required to be filled in, the proviso at the end of the section applied to the whole section and not to sub-section 4 only, in which it was to be found. The Supreme Court came to a different conclusion, and held it to apply only to sub-section 4; and, on appeal to

Judgment.
BURTON,
C.J.O.

the Privy Council, the Committee intimated a strong opinion that it was a mere matter of grammatical construction upon which they would probably not entertain an appeal, and did not call upon the respondents' counsel, and the case is now standing on the list for judgment.

The result is that the Railway Committee of the Privy Council have no authority to dispense with the packing of the frog at any time, and the injury which resulted in the death of the husband of the plaintiff having been found by the jury to have been caused by the omission of the company to have the frog protected, a verdict was rendered in the plaintiffs' favour for \$5,500.

It goes without saying that if the plaintiff had been obliged to resort to the Workmen's Compensation for Injuries Act this verdict could not stand, as the damages recoverable under that Act are limited to \$1,500, or three years' wages; but I do not understand that she is obliged to seek her remedy under it.

We held, in *LeMay v. Canadian Pacific R. W. Co.* (1890), 17 A. R. 293, that the omission to pack was the neglect of the company and not of a fellow-servant, and that the doctrine of *Priestley v. Fowler* (1837), 3 M. & W. 1, had no application.

But it was urged before us that section 289 was *ultra vires* in enacting that the company or any of its directors or officers causing or permitting to be done any act or thing contrary to the provisions of the Act, or omitting to do any matter, act or thing required to be done on their part, were liable to the person injured thereby for the full amount of damages sustained by any such act or omission. That would be a singular result if we were compelled to give effect to the contention.

The Dominion Parliament alone has power to deal with the operation of the road, and the making of regulations for the safety of passengers and the protection of human life. It would be strange indeed if, having these powers given to them by the Act, with a corresponding liability, they were debarred from declaring that any person injured

by a violation of the provisions of the Act should have a remedy against the company or its officials. It may be an unnecessary provision, but I am at a loss to understand how they are exceeding their jurisdiction in declaring it. I can see no reason whatever why the same Parliament which has the power to make these directions and regulations should not have the power to enact that the party doing the wrong, or omitting to perform what he or they are directed to do, should be liable to any person injured by such wrong or omission.

Judgment.

BURTON,
C.J.O.

I think such a power is incident to the general legislation entrusted to them to construct and deal with such undertakings, and ought not to be restricted in the way suggested.

But this is an action under our own statute, R. S. O. ch. 166, founded upon the Act known in England as Lord Campbell's Act, which enacts that where the death of a person has been caused by such wrongful act, neglect or default as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured.

This has been held to be an independent action to recover such damages as the parties for whose benefit the action is brought have sustained: that is to say the pecuniary injury that they have respectively sustained by reason of the death.

This action, I have no doubt, was originally launched as an action under the Workmen's Compensation for Injuries Act, and the evidence of loss was confined to damages recoverable under that Act, and there is really no evidence upon which the jury could properly compute the proper amount of damages under Lord Campbell's Act; but the verdict is very largely in excess of what would be properly recoverable according to the rules which, after some fluctuation of opinion, seem to have been arrived at in computing damages under Lord Campbell's Act.

Judgment.

BURTON,
C.J.O.

Rowley v. London and North-Western R. W. Co. (1873), L. R. 8 Exch. 221, is an instructive case as to the proper mode of arriving at a result.

Here we know that the income of the deceased did not exceed \$500, and we know his age; but we are not aware whether his state of health was good or otherwise, which would have been the correct mode of computing the probable duration of his life, and not by reference to the average duration of life.

I think upon the evidence here a verdict for \$3,000 would be the full extent of the damages recoverable.

Even under the Workmen's Compensation Act, the action should have been brought by the personal representatives of the deceased. Under Lord Campbell's Act, and subject to certain limitations, the executors or administrators are the persons.

The point was raised by the Judge, whether the statute did not provide for the action being given to the parties beneficially entitled only after the expiry of six months, and he was told by the counsel that there was a more recent enactment which enabled them to bring it at any time. This, however, is not the case; but an interpretation has been placed on the statute, supported by an Irish decision, which would seem to warrant the action being brought in this form within the six months.

As to the jurisdiction to entertain a motion for a new trial, if the case is properly before us, it is too late to raise the question in this Court.

Under any circumstances we think there could not be a recovery in excess of \$3,000, and unless the parties agree to that reduction, we must send the case down for a new trial. If that amount is accepted we distribute it as follows: \$2,000 to the widow, and \$1,000 to the child—the infant's share to be paid into Court, as directed by the learned Judge below; and in that event we give to the plaintiffs the costs of the appeal; if not, there will be no costs of the appeal and the costs of the last trial will be left to the Judge who tries the case.

OSLER, J.A.:—

Judgment.

OSLER,
J.A.

The case seems not distinguishable from that of *Washington v. Grand Trunk R. W. Co.* (1897), 28 S. C. R. 184, except that the action is brought under the Fatal Accidents Act, R. S. O. ch. 166, in respect of the death of the plaintiff's husband, instead of by the person injured for the loss of a limb.

The deceased was a switchman in the defendants' employment and, on the 15th of March, 1897, met with the accident which caused his death a few days afterwards. He was engaged in the work of shunting cars from one track to another, involving the duty of coupling and uncoupling the cars. Stepping out from between them in order to allow of some movement of the engine to which they were attached, his foot was caught in an unpacked frog, and before he could extricate it the cars came down upon him, inflicting the wounds of which he afterwards died.

The defendants relied upon the same order of the Railway Committee of the Privy Council, made under the supposed authority of section 262 of the Railway Act, 1888, which they set up in the *Washington* case, as having relieved them from the obligation of having the frog packed at the time the accident occurred. The decision of this Court, however, seems to have been reversed by the Supreme Court of Canada on this point, and it is held by that Court, if I rightly understand the language of Sedgewick, J., that the Railway Committee had no authority to dispense with the obligation of packing the frog, whatever may be the case as regards the wing or guard rails.

The order-in-council is, therefore, of no avail to the defendants.

It was then argued that if the cause of action arises out of the non-observance of the provisions of the Workmen's Compensation Act the verdict should be reduced to \$1,500, which is the maximum recoverable under that Act.

Judgment.

OSLER,
J.A.

Looking at the statement of claim and the course taken at the trial, in some respects it would certainly appear as if the plaintiffs had had that Act in view all along, and the evidence as to damages really seems to have been given with the object of proving the claim up to the statutory limit. There is, however, a clause in the statement of claim of a general character, opening a demand for damages up to any amount in respect of any legal cause of action which could be established, and the learned trial Judge, in his charge to the jury, may be said to have invited a verdict for a sum far beyond \$1,500, treating the action as one based upon section 289 for breach of the duty imposed by section 262.

We held in the *Washington* case that the provisions of the Workmen's Compensation Act relating to the packing of the frog did not apply to these defendants, and that view has not been found fault with by the Supreme Court. On the contrary, it must have been approved of, as the plaintiff there recovered a much larger sum than he could have recovered under that Act. The action, therefore, rests upon the provisions of the Railway Act alone, and that being so, there is no such conflict between the Dominion and Provincial legislation as to raise any question as to the former being *ultra vires* in authorizing the recovery of the damages at large, or in conferring a right of action for breach of the duty imposed by section 262.

The defendants again raised the question whether they were not, as they strenuously insisted, entitled to rely upon the defence of common employment, the omission to keep the frog packed being, as they urge, negligence of a fellow-servant of the deceased. I do not see how such a defence consists very well with the defence set up under the order-in-council which was procured and acted upon by the corporation itself. It is not a question of negligence at all. However that may be, we overruled this very objection in an action brought by a switchman for a similar injury in *LeMay v. Canadian Pacific R. W. Co.* (1890), 17 A. R. 293, holding that he was a "person injured"

within the meaning of the section, and was one of a class of persons whose protection was aimed at by the Act. Higher authority for the principle of interpretation we then acted upon is now to be found in *Groves v. Lord Wimborne*, [1898] 2 Q. B. 402, a decision upon the Factory Acts, where it is expressly laid down that the defence of common employment is not applicable where the injury has been caused to a servant by the breach of an absolute duty imposed by Act of Parliament upon the master for his protection.

Judgment.

OSLER,
J.A.

Something has been suggested as to whether the action has not been brought too soon, the plaintiff having sued within six months after the death. But it is clear that there is nothing in the point, for section 7 of the Act gives two alternatives, (1) where there is no executor or administrator, and (2) where there is, but the executor has not within six months brought the action. In either of these events the person for whose benefit the action must have been brought may sue. Here there was no executor, and the action is competent: *Lampman v. Township of Gainsborough* (1888), 17 O. R. 191, following an Irish decision to the same effect.

On the question of damages I do not dissent, under all the circumstances, from the view taken by the other members of the Court.

Moss, J. A. :—

So far as indicated by the statement of claim this action was launched chiefly with reference to the provisions of the Workmen's Compensation Act, but there are in it allegations wide enough to embrace a breach of the obligations imposed by sec. 262 of the Dominion Railway Act, and at the trial the action was dealt with upon the latter footing.

That being so, the substantial defences appear to be fully met by decisions of the Supreme Court of Canada and of this Court. The decision of the Supreme Court in *Washington v. Grand Trunk R. W. Co.* (1897), 28 S. C. R. 184, disposes of the defence justifying the want

Judgment. of packing between the months of November and April,
Moss, and the decision of this Court in the same case (1897), 24
J.A. A. R. 183, is equally conclusive as to the contention that
the plaintiffs' remedies must rest upon the provisions of
the Workmen's Compensation Act.

So far as this case is concerned, therefore, no question
arises of alleged conflict between Dominion and Provincial
legislation.

The defence of common employment is not open to the
defendants in this action.

The cause of action arises upon a breach of a statutory
obligation imposed for the protection of a class of persons
of whom the party in whose right the action is maintained
was one, and in such case the negligence of a fellow-ser-
vant is no answer.

The Railway Act expressly gives a right of action to
the person injured through the neglect or omission of the
company, and in that respect the plaintiffs' case is stronger
than the recent case of *Groves v. Lord Wimborne*, [1898]
2 Q. B. 402: see *LeMay v. Canadian Pacific R. W. Co.*
(1890), 17 A. R. 293.

It was suggested that the action was premature, having
been brought by the widow and child before the lapse of
six months from the death. But at the date of the com-
mencement of the action there was no executor or admin-
istrator of the deceased, and therefore it was open to the
plaintiffs to bring this action at the time it was instituted:
R. S. O. (1887) ch. 138, sec. 7; *Holleran v. Bagnell* (1879),
4 L. R. Ir. 740; *Lampman v. Township of Gainsborough*
(1888), 17 O. R. 191.

As to the damages, they appear to be very large, espe-
cially in view of the meagre evidence bearing on the
subject laid before the jury, and I think they ought to be
reduced to a more moderate amount.

MACLENNAN, J. A., concurred.

Damages to be reduced or new trial had.

R. S. C.

MCCULLOCH V. TOWNSHIP OF CALEDONIA.

Drainage—Invalid By-law—Damages—Charging Assessed Area.

The municipal council of a township passed a provisional by-law for the construction of drainage works affecting land in three townships, in accordance with the assessment, specifications and estimates contained in the report, upon petition, theretofore made by their engineer. On the matter coming up before the Court of Revision it was found that the petition had not been signed by the necessary number of owners. The council then, without any new petition or engineer's report, altered the report already made, reducing the size and cost of the work, changing the specifications, estimates and assessments accordingly, and passed a by-law for the construction of the works, as in the altered report, in the three townships:—

Held, that this by-law was void.

Raleigh v. Williams, [1893] A. C. 540, at p. 550, applied.

Where a by-law for the construction of drainage works is void, damages awarded to a landowner on account of injury to his crops caused by the negligent construction of the work are not to be charged against the drainage area assessed for the work, but are chargeable against the initiating municipality.

Judgment of the Drainage Referee reversed in part.

THIS was an appeal by the plaintiff from the judgment Statement of the Drainage Referee.

The following statement of the facts is taken from the judgment of OSLER, J. A.

This action is brought by the plaintiff as the owner in fee of certain land in the township of Alfred, to recover damages for injuries sustained by reason of water brought down upon the land by the negligence of the defendants.

The statement of claim alleges that a natural water-course, known as the Caledonia creek, flows through the land, to the use of which in its natural condition the plaintiff is entitled, and that her land and other lands are drained thereby; that in October, 1891, the defendants began to deepen, clean and widen the stream, and that owing to the negligent manner in which they did so, much larger quantities of water came into the creek and flowed down it with greater velocity than had formerly been the case; and the defendants having provided no sufficient outlet therefor, the water flowed over the plaintiff's lands in the years 1892, 1893, 1894, 1895 and 1896, doing great damage to her crops and otherwise.

Statement. The defendants plead that in 1891, acting upon the petition of the owners of lands drained or partially drained by this creek, and pursuant to the powers and authority conferred upon them by the Municipal Act then in force, they procured plans and estimates of the cost of certain proposed improvements in the creek and an assessment of the cost upon the lands proposed to be benefited, and that on the 12th of September, 1891, the report of the engineer employed by them for that purpose, as amended by the Court of Revision for the trial of complaints against the assessment, was adopted by a by-law No. 255 of the defendants, and that any alteration made or work performed in the said creek was done and performed in the lawful execution of the improvements mentioned and referred to in the by-law; that the petition referred to was signed by John McCulloch, the plaintiff's husband, as a party interested in the proposed work in respect of the land; that he was the manager of the plaintiff's business generally and in particular with respect to all matters relating to the said land, and was her duly authorized agent in signing the petition and presenting it to the council, and she afterwards ratified and confirmed his action in that respect. That if the plaintiff has sustained any damage in consequence of the work, a great part of the work which is now said to have been negligently executed was done by the plaintiff's husband with her workmen and with her horses, implements, etc., and the proceeds of the work were largely used and applied for the common benefit of the plaintiff and her husband, and the latter acted throughout with her full knowledge, privity and consent, *per quod* the plaintiff is estopped, etc. That before the commencement of the work the Caledonia creek did not effectually drain the said land as alleged, but on the contrary a large part thereof was annually overflowed and rendered unfit for cultivation, and the plaintiff has not only not been damaged as alleged in the claim, but the lands have been greatly improved and benefited by the improvements. The defendants also say that prior to the action the plaintiff never

made any complaint to them of the nuisance alleged, or notified them that her lands, etc., were suffering damage; that the defendants acted in all things in the lawful exercise of the statutory powers vested in them by the Municipal Act, and if the plaintiff has sustained damage for which the defendants are responsible, she cannot recover it in an action, but should have referred the same to arbitration pursuant to the Drainage Act of 1894, 57 Vict. ch. 56, sec. 93 (O.).

Lastly, the defendants allege that the plaintiff did not serve on the defendants any notice of her claim for damages, nor did she file any such notice in the office of the clerk of the county court of the county in which the land is situate, and in other respects failed to comply with the provisions of the said section 93, and the defendants submit that she cannot maintain the action, or recover damages from the defendants in respect of the matters aforesaid.

On this the plaintiff joined issue.

The action was entered for trial at the sittings of the High Court held at L'Original on the 26th of May, 1897, before MEREDITH, J., who made an order referring it to the Drainage Referee under the Drainage Act, before whom it came on to be tried on the 23rd of June, 1897, and following days.

The Referee held as to the claim for damages for the year 1892, that it was a claim for damages done to property during the construction of drainage works or consequent thereon, and that in the absence of proof of service and filing of the notice of claim, as required by section 93 (2) of the Drainage Act, it was not recoverable in this action.

The damage sustained in 1893 was found to have been caused by the flooding caused by the backing up of the Nation river and not by the defendants' negligence.

They were found liable for the damage caused in 1894 and 1895, because the drainage work was insufficient for the purpose for which it had been constructed. For the same

Statement. reason they were held liable for the damage of 1896. Damages were assessed in all at \$189, viz., for 1894 \$91.25, for 1895 \$37, and for 1896 \$60.75; and such damages were directed to be borne as required by sec. 97 (1) of the Drainage Act, *i.e.*, by the lands in the area assessed for the drainage work by the by-law under which it purported to have been done.

The plaintiff appealed and the appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 26th, 27th, and 30th of May, 1898.

J. M. McEvoy, and *A. McCrimmon*, for the appellant.
Robinson, Q.C., and *W. S. Hall*, for the respondents.

November 15th, 1898. BURTON, C. J. O. :—

I agree in thinking the by-law under which the defendants attempt to justify absolutely null and void for numerous reasons, but it is sufficient to say that it is not founded upon a report, plans, estimates or specifications of an engineer appointed by the council to deal with the works petitioned for, but provides for a drainage work initiated by the council itself under specifications prepared by itself and upon property selected by itself instead of by the engineer.

The work, therefore, was done without legal authority and the plaintiff is entitled to maintain an action as if no such by-law had been ever passed, but looking at the manner in which with her concurrence her husband took a contract to do the cutting, she was I think well advised in bringing the action for negligence instead of treating the defendants as trespassers.

I think that if the learned Referee's judgment was varied in the two respects suggested by my brother Osler substantial justice will be done and the defendants should pay the costs of the appeal.

OSLER, J. A. :—

Judgment.

OSLER,
J. A.

The plaintiff appeals (1) on the ground that the damages having been caused by the negligence of the defendants, the initiating township, no part thereof ought to have been cast upon the other two townships, as the effect of this would be to make the plaintiff, whose lands lay in Alfred, contribute to a large share of her own loss ; and (2) against the refusal to award anything in respect of the damages suffered by the plaintiff in 1892, which were owing, as much as those of other years, to the defendants' negligence, and were the subject of an action strictly and not of proceedings for compensation by way of arbitration ; and (3) as to the damages for 1896 that no reduction should have been made therein on the ground of the plaintiff herself having contributed to them by using her land with the knowledge that it was likely to be flooded ; and (4) it was further contended that the by-law, under the authority of which the defendants justified their operations, was wholly void and invalid, and, therefore, that the plaintiff's remedy against them was not subject to any of the restrictions imposed by the Drainage Act as to notice or proceeding by way of arbitration, etc.

The defendants supported their by-law, and the judgment of the Referee in so far as related to the damages claimed for 1892 and 1893, the reduced amount for 1896, and the charge of the whole amount awarded upon the area assessed under the by-law. They contended that the damage awarded was not caused by their negligence, and that if the plaintiff was entitled to recover anything at all she should have proceeded by arbitration and not by action, and they cross-appealed on this ground.

The defendants also contended that the plaintiff was identified in interest with her husband, and that by reason of his acts as her agent or manager of her farm she was estopped from objecting to the by-law and from objecting that her loss was caused by the action of the defendants.

In the present state of the statute law it appears to be a

Judgment.

OSLER,
J.A.

matter of little moment whether a party commences his proceeding for statutory compensation by arbitration or by action. If he has adopted the latter course when he should have taken the former, the reference of the action to the Drainage Referee remits his demand to the proper jurisdiction: *Township of Ellice v. Hiles* (1894), 23 S. C. R. 429; *Thackery v. Township of Raleigh* (1898), 25 A. R. 226, 231. The preliminary notice required by sec. 93, sub-sec.(2), in cases where arbitration is the appropriate remedy, may perhaps be necessary, though as to this I express no opinion, but in other respects the plaintiff cannot be turned round merely because he has issued a writ instead of proceeding by arbitration.

It will simplify the consideration of the case to enquire in the first place whether the by-law under which the defendants justify their proceedings is, or is not, a valid by-law, a question to which the Referee's attention cannot have been directed. If it is not, questions as to what part of the plaintiff's claim is arbitrable, and as to notice of the claim having been filed and served within a year from the time it arose, and perhaps others also, will be eliminated.

The by-law was for the deepening, widening and cleaning parts of a watercourse called the Caledonia creek, a stream of considerable size flowing through the townships of Caledonia, Alfred and Plantagenet, and discharging into the Nation river in the latter township.

Proceedings were commenced by a petition to the township council of Caledonia signed by twelve ratepayers of Caledonia and four of Alfred, dated the 25th of May, 1891, setting forth that it was expedient to deepen and widen Caledonia creek from lot 18 in the 5th concession of Caledonia to the Alfred boundary, and thence through the township of Alfred to a point intersected by a channel into which the watercourse at present flows, and thence to the outlet of the channel known as the Franklin creek. This petition was signed by twelve property owners on nine lots in Caledonia, four in Alfred, and by none in Plantagenet.

The council referred it to their engineer with the usual

instructions under sec. 569 of the then Municipal Act. He made a report bearing date the 13th of July, 1891, in which he stated that he had examined the creek from the Nation river up to lot 18 in the 5th concession of Caledonia, and recommended a scheme by which the creek was to be cleaned, deepened, widened and improved, at a cost of \$1,959. The scheme involved the making of a new outlet from a certain point on the creek in the township of Plantagenet, through that township to the Nation river, and shortening its course by making cuts through farm lots at various places, notably one through the plaintiff's farm in the township of Alfred. The specifications set forth the depth and top and bottom width of the drain and the work to be done therein. The cost of construction and improvement was estimated at \$1,959, including clerk's and engineer's fees, and was assessed, against lands and roads improved in Caledonia as set forth in the schedule to the report \$1,241, the same in Plantagenet \$76, and in Alfred \$642.

Judgment.

OSLER,
J.A.

On the same day, 13th of July, 1891, a provisional by-law was passed for the adoption of the engineer's scheme as reported, the report being set out in full. The by-law purports to impose an assessment, and to fix the rate to be levied upon the lands benefited in each township, and notice is given thereby that a court of revision will be held at the town hall in Fenaghvale in the township of Caledonia to hear appeals against the "above and foregoing" assessments, that is to say, the assessments in all three townships, on Friday, the 30th of August, 1891. Notice of appeal was required to be served on the clerk of Caledonia eight days before the session of the court, and parties intending to move to have the by-law quashed were required to serve notice in writing as required by the statute, etc.

The by-law was duly published on the 5th, 12th, 19th, and 26th of August. When the court of revision met, it was observed that the petition of the property owners was not sufficiently signed to justify a scheme of the propor-

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OSLER,
J.A.

tions and cost recommended by the engineer, and the court was adjourned until the 12th of September, the council having determined to pass a by-law to carry out a very different scheme, the cost of which was to be \$1,411 only, assessed against lands and roads in Caledonia \$755, 19 lots in two concessions instead of 138 lots in four concessions as in the engineer's report : in Plantagenet, the same as in the report, \$76 : and in Alfred \$580, omitting the lots in one concession. This by-law was passed at the adjourned meeting of the court of revision, notice of which had been given to the property holders affected. It was of course an entirely different by-law from that which had been provisionally published. It was published once in a newspaper after it was passed, on the 30th of September, 1891. It does not appear to have been registered. It purports to assess the lots mentioned therein in the three townships affected, and to provide for the levying and recovery of the assessment by the corporation of the initiating township. It recites an alleged report of the engineer dated the 28th of August, the frame and language of which are the same as those of the former report but limits the assessments to the lesser number of lots, and reduces the cost of the work, and the size of the improvements in the way of cutting the outlet and cross cuts which had been recommended in the report of the 13th of July. It is the fact that no new report was made by the engineer, and that the report, as set forth in the by-law, was never in existence and represents merely changes made by the council itself in the report of the 13th of July. It appeared that the engineer was present when the council determined to adopt the substituted scheme, and although it is said that he made no opposition, his position, as stated in the reeve's evidence, was practically this "that if the council wanted to change his report they could but that it would not be his report." Elsewhere in the evidence it is stated that he thought the lessening of the width of the creek was not right, that the council asked him to change it and that he refused to do so.

A by-law thus passed is not such a by-law as is authorized by the Municipal Act, R. S. O., 1887, ch. 184, or the subsequent Acts in which the drainage clauses of that Act are found. It is a by-law which affected three townships and was passed by one of them without complying with the conditions on which the jurisdiction to do so depended. Had its operation been confined to the township of Caledonia alone it could not have been upheld as a by-law under section 569. As it is, its two obvious defects are ; first, that it is not founded upon any by-law provisionally passed as by law required, for it provides for an entirely different scheme from that of the provisional by-law of the 13th of July, 1891 : *Corporation of Raleigh v. Williams*, [1893] A. C., at p. 550 ; and secondly that it is not based upon any report, plans, estimates or specifications of an engineer appointed by the council to deal with the drainage work petitioned for, but provides for a drainage work devised by the council itself to be carried out in accordance with their own specifications and directions, and the cost of which is assessed upon property selected by themselves in their own and in two other townships.

Judgment.

OSLER,
J.A.

The by-law is open to other objections, one of which is that the council omitted to comply with the requirements of section 579 as to the other townships affected and profess to work out the whole scheme of assessment, revision of assessment, and collection of rates, through their own municipal machinery. It is unnecessary, however, to consider these objections at length. It is enough to say that the effect of those which I have already dealt with is that the by-law is a void by-law and that the work done thereunder was done without legal authority.

From this it seems to follow : 1st, that the plaintiff has the right to enforce, in the ordinary way, her claim for the damage sustained by her by any action which she could maintain without having first set aside the by-law and without being subject to any of the restrictions imposed by the 93rd section of the Drainage Act; and

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OSLER,
J.A.

2nd, that the Referee had no power to restrict the damages awarded to be recovered by assessment upon the drainage area originally assessed.

This opens the question of the plaintiff's claim for damages in 1892, which the Referee disallowed on the ground that, being the subject of arbitration alone, it could not be recovered because no notice of the claim had been given as required by the 93rd section.

The cross-appeal, which strikes at the plaintiff's right to recover anything at all, may conveniently first be considered so far as it has not been already disposed of by what I have said as to the invalidity of the by-law. Substantially the defence on this ground is reduced to the two objections, (1) that the plaintiff is not really the owner of the farm alleged to have been damaged, but that it belongs to her husband, to whose improper and negligent conduct in digging the drain through the farm under his contract with the defendants the damage is alone attributable; and (2) that even if the plaintiff is to be regarded as the owner, she is identified with her husband, who was her manager and agent in all that was done.

It appears that the husband conveyed the land in question to the plaintiff in September, 1890, the expressed consideration being natural love and affection, the sum of \$100, and a covenant on the wife's part to indemnify him against certain incumbrances on the land. The husband and wife continued to live together on the farm and the former continued to manage it very much as he had formerly done. He also signed the petition of the 25th of May, on which the engineer's report of the 13th of July, 1891, was founded, and he took the contract for digging the cut through the farm provided for by the by-law No. 255, and the cutting was excavated and made by him under that contract so far as it was done.

All this may well be inferred from the evidence to have been done with the knowledge and without the disapproval of the plaintiff, although as regards the cutting through the farm the husband was not her agent, but the

contractor with and the agent of the municipality. I think the evidence could not warrant us in holding that the deed to the wife was not a real transaction and that she is not the owner of the land. I think she is, and we have nothing to do with any possible rights of the husband's creditors, if he had any, to impeach it.

The most we can say is that the plaintiff could not maintain, and indeed she does not seek to maintain, an action of trespass against the defendants for what was done, particularly as the by-law has never been set aside : *Hill v. Middagh* (1889), 16 A. R. 356.

The action is grounded on the negligence of the defendants in not making the drain through the plaintiff's farm of sufficient capacity to carry away the water which by their work on the creek above the farm they brought down upon it, and which thus overflowed the land and caused the damage complained of.

There is ample evidence to shew that this was the case and that the damage would not have happened had the cutting been made of the size recommended by the engineer in the only report he made to the council.

There is, in my opinion, sufficient evidence of negligence in this respect to maintain the action. It may be that the damage was to some extent attributable to the failure of the plaintiff's husband to make the excavation to the full extent he contracted to make it, but even had he complied literally with the terms of his contract, it is evident that the cutting would not have been sufficient to carry away the water brought down by reason of the other work on the creek. The Referee has made some allowance in this respect, and considering the difficulty there is in arriving on the evidence at any exact estimate of the plaintiff's loss I do not quarrel with the way in which he has disposed of the case in regard to the years 1894, 1895 and 1896. There is evidence also to support his finding that the damage of 1893 was directly owing to the waters of the Nation river having backed up and flooded the farm, rather than to overflow from the waters above it. There is nothing, in

Judgment.
OSLER,
J.A.

Judgment.
OSLER,
J.A.

the way in which I view the case, to prevent the plaintiff from recovering for the damage of 1892, a fair estimate for which, I think, would be something under \$100. Probably \$80 would be a reasonable sum to allow.

The report of the Referee should be varied in the two particulars I have indicated, viz., by increasing the damages by \$80 and by striking out that part of it which directs them to be levied upon the area assessed. The defendants must pay the costs of the appeal.

MACLENNAN, and MOSS, J.J.A., concurred.

Appeal allowed.

R. S. C.

MILLER V. LEA.

Action—Assault—Criminal Prosecution—Civil Remedy—Justice of the Peace—Alteration of Charge—Certificate.

Justices of the peace, before whom a charge of “shooting and wounding with intent to do grievous bodily harm” came on for preliminary hearing, changed it of their own motion to one of common assault and convicted and fined the accused. The information was laid by a peace officer, and the person aggrieved attended the hearing pursuant to subpoena and gave evidence, and did not object when the charge was changed:—

Held, that the justices had no right to alter the charge to one of common assault, and that their certificate of conviction and payment of the fine was a nullity and no bar under section 866 of the Code to an action by the person aggrieved to recover damages.

Judgment of a Divisional Court reversed.

Statement. THIS was an appeal by the plaintiff from the judgment of a Divisional Court.

The action was brought to recover damages for assault, and the defendant pleaded under section 866 of the Code a criminal prosecution and conviction. The nature of the assault, and the consequent proceedings, are set out in the judgments.

The action was tried at Toronto on the 6th of October, 1897, before MACMAHON, J., and a jury, when the learned Judge gave effect to the objection and dismissed the action. Statement.

This ruling was affirmed by a Divisional Court (ARMOUR, C.J., and FALCONBRIDGE, J.).

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 22nd of September, 1898.

Wallace Nesbitt, and *W. J. Clark*, for the appellant. The information was for an indictable offence, and section 866 of the Criminal Code does not apply. The certificate was a nullity and there was no need to quash it: *Reed v. Nutt* (1890), 24 Q. B. D., at p. 673; *Hancock v. Somes* (1859), 1 E. & E. 795. Moreover, the information was not laid by or on behalf of the appellant: *Nicholson v. Booth* (1888), 16 Cox C. C. 373. The effect of the section has been somewhat considered in *Flick v. Brisbin* (1895), 26 O. R. 423, and *Nevills v. Ballard* (1897), 28 O. R. 588.

Delumere, Q.C., and *Snider*, for the respondent. It is a question of fact whether the information was laid by or on behalf of the appellant. Upon that question of fact the Judge at the trial decided against him, and his finding has been affirmed by the Divisional Court and should not be disturbed. There is ample evidence to support it. The charge was reduced to one of assault in the plaintiff's presence and without objection by him.

Wallace Nesbitt, in reply.

November 15th, 1898. BURTON, C.J.O.:—

The information in this case was laid by a peace officer, presumably in the execution of his duty, against the defendant for shooting with intent to do grievous bodily harm to the plaintiff and there was no evidence adduced at the trial to shew that it was laid on behalf of the plaintiff, if that would have been material, which it would not have

Judgment.

BURTON,
C.J.O.

been as it was a criminal charge the result of which could not affect the plaintiff's civil remedy.

If the officer had assumed to lay an information for an assault it may be that the plaintiff by omitting to object at the hearing might have been held to ratify or affirm the charge, but at most the omission to take objection affirmed the criminal information only and could not deprive him of his civil remedy.

If it was competent to the magistrates of their own mere motion to amend the information and change it into one for a common assault that could not affect the plaintiff and make it his act; he was summoned as a witness and gave evidence on the criminal charge and it was immaterial to him how that charge was disposed of.

The proceedings so far as he knew were regular enough and he was bound as a law abiding individual to attend and give evidence in support of the criminal charge and there was nothing for him to object to.

It is only where he has elected to proceed summarily for an assault that his civil remedy can be affected and it is only in such a case that the conviction by the magistrate can be pleaded in bar of the action.

The nonsuit and its subsequent affirmance by the Divisional Court must be set aside and a new trial had.

OSLER, J.A. :—

I think that the nonsuit was wrong, and that there should be a new trial. The action is in trespass for assault and battery by shooting at and wounding the plaintiff. The defendant pleads that he was convicted therefor for a common assault by two justices of the peace and having paid the fine and costs adjudged is by section 866 of the Code released from "all further or other proceedings, civil or criminal, for the same cause."

The statement of defence shews that the information or charge laid against the defendant was for an offence under section 241 of the Code, viz., for shooting and wounding

with intent to do some grievous bodily harm, an offence which, it is needless to say, justices of the peace have no jurisdiction to try summarily. It matters not, therefore, in the case of such an information, whether it was laid by or on behalf of the party aggrieved, or, as in the present case it was, by a constable simply in the discharge of his duty. The plaintiff was summoned to give and gave evidence on the charge laid but the justices instead of committing the accused for trial on that charge, or on one of a lower grade, or discharging him, one of which courses alone they had jurisdiction to take, assumed to convert the charge, or in the language of the statement of defence, to reduce it, to a charge of common assault and then to dispose of it summarily by convicting the defendant.

Now, the charge or information which justices have jurisdiction to hear and determine summarily, unless at the time of entering upon the investigation the person aggrieved or the person accused objects thereto, is a charge or information for what is generally spoken of as a common assault. This is apparent from section 265 and sections 864, 865 and 866 of the Criminal Code. The first of these sections enacts that every one who commits a common assault is guilty of an indictable offence, and liable, if convicted upon an indictment, to one year's imprisonment or to a fine not exceeding \$100, and on summary conviction to a fine not exceeding \$20 and costs, or to two months' imprisonment with or without hard labour.

In part 58 of the Code, which deals with the subject of summary convictions before justices of the peace as distinguished from "speedy trials" and "summary trials" of indictable offences, under parts 54 and 55, we find section 864, which provides for the case in which a summary conviction may be made for an assault, which is plainly the summary conviction referred to in section 265. "Whenever any person unlawfully assaults or beats any other person"—that is to say an assault and battery, unaccompanied with any of those aggravating circumstances which give to it the character of any of the distinct

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offences recognized by other sections of the Code as something more than a mere assault—"any justice may summarily hear and determine the charge"—that is the charge simply of an assault and battery—"unless at the time of entering upon the investigation the person aggrieved or the person accused objects thereto."

Sub-section (2). "If such justice is of opinion that the assault or battery complained of is, from any other circumstance"—and this very word "other" indicates that the charge as laid must be one which the justice has power to deal with summarily—"a fit subject for prosecution by indictment," as for example, if the evidence discloses a more serious offence than a common assault, or if, even though no more than a common assault, the only penalty which he could impose summarily would under the circumstances be inadequate, "he shall abstain from any adjudication thereupon and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same."

Sections 865 and 866 also shew that the charge which the justice is investigating must be one which, as disclosed by the information or complaint, he has in the absence of objection jurisdiction to try upon the merits and dispose of summarily. That indeed is the whole scope of this part of the Code.

It is most important in cases of this kind to insist upon the principle that the right of the justices to adjudicate is confined within the limits of the information, because a police or stipendiary magistrate has power to convict summarily under this part of the Code as well as to try summarily certain other classes of assault of a more serious nature under sections 783 and 785, part 55, of the Code, where the effect of a conviction or of the dismissal of the charge differs from that under part 58 and merely frees the offender from all other *criminal* proceedings for the same cause.

It is to be observed that in cases of assaults upon women and children when the charge, *i.e.*, a charge of com-

mon assault, is laid before a police magistrate or other magistrate as defined in section 782, the magistrate, instead of acting under section 864 (2), by abstaining from adjudication and committing for trial when he thinks the offence as proved would not be sufficiently punished by a summary conviction under part 58, may try the case summarily—not under that part but—under the provisions of part 53, which enable him to impose a more severe punishment.

Judgment.

 OSLER,
J.A.

It is true that where the *charge* is for an unlawful assault and battery, *i.e.*, assault and battery simpliciter or common assault, the justices may convict and their conviction may be good and a bar to further civil and criminal proceedings even although the evidence discloses a more serious offence such as malicious wounding, or wounding and causing grievous or actual bodily harm, and although it may be that they should have obeyed the directions of section 864 (2) and abstained from convicting: *Regina v. Stanton* (1851), 5 Cox C. C. 324; *Regina v. Elrington* (1861), 1 B. & S. 688; *Regina v. Inhabitants of Denton* (1864), 5 B. & S. 821; *Ex p. Thompson* (1860), 6 Jur. N. S. 1247; *The Queen v. Miles* (1890), 24 Q. B. D. 423, 432, 433, 434. But this is because the information is for an offence for which they have power to convict summarily and they have not thought fit, it must be assumed for sufficient reasons, to take the course prescribed by section 864(2). That, however, is a very different thing from convicting summarily under part 58 where the only information before them is for an offence which they have no jurisdiction so to dispose of.

As Hawkins, J., observes in *The Queen v. Miles*, referring to such miscarriages of justice as I have adverted to, they are not likely to happen by reason of any default of the justices if they pursue the simple course of steadily bearing in mind the charge before them. "If that charge be one of felony, or misdemeanour punishable by indictment only, they have no jurisdiction to adjudicate; they can but commit for trial or refuse so to do." See

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also *The Queen v. Hughes* (1879), 4 Q. B. D. 614 ; Stone's Justices' Manual, 29th ed., 1897, pp. 132, 690.

That, I may also say, is the limit of their jurisdiction where the charge though of assault simpliciter has not been laid by or on behalf of the party aggrieved.

In the case at bar the charge which the justices were proceeding to investigate was a charge of felonious assault. The party aggrieved was not called upon to do anything but to give his evidence. He could not object to the justices proceeding to hear it in the ordinary course of their duty. It may be assumed for the purpose of the case that the information had been laid by him or on his behalf. But whether that was so or not, it was one the disposition of which could not affect his civil rights in respect of the assault because the justices had no power to make a summary conviction upon it or of their own motion so to mould it as to confer upon themselves jurisdiction to do so.

Probably as all parties were before the magistrates they might have agreed, if the latter were of opinion that the charge in the information was not borne out by the evidence, that such charge should be abandoned and the case tried summarily as for a mere assault without laying a fresh information. The complaint would then be made by the party aggrieved. But this is very far from what appears to have been done. I refer to *Turner v. Postmaster General* (1864), 5 B. & S. 756 ; *Peek v. DeRutzen* (1882), 46 J. P. 313 ; *Egginton v. Pearl* (1875), 33 L. T. N. S. 428 ; *Johnson v. Colam* (1875), 23 W. R. 697.

It is only necessary to add that the case of *Reed v. Nutt* (1890), 24 Q. B. D. 669, shews that the circumstances under which the certificate of conviction was given may now be enquired into and its futility proved although the conviction has not been quashed.

LISTER, J.A. :—

The case turns upon whether the defendant is released from liability in this action under section 866 of "The Criminal Code, 1892."

A peace officer laid an information before a justice of the peace charging the defendant with having "unlawfully shot and wounded the plaintiff with intent to do him grievous bodily harm."

Judgment.

LISTER,
J.A.

The charge as laid was investigated by two justices of the peace. The plaintiff was subpoenaed as a witness by the prosecutor on the charge as laid, attended the investigation, and gave his evidence. The officer before preferring the charge went to the plaintiff and obtained from him the particulars of the alleged shooting. The justices upon the charge as laid convicted the defendant of a common assault, and imposed a fine and costs which the defendant paid, and now claims that the conviction operates as a release of all liability in this action under section 866 of the Code, which enacts as follows: "If the person against whom any such complaint (complaint for assault or battery mentioned in section 865) has been preferred, by or on behalf of the person aggrieved, obtains such certificate (the certificate of dismissal provided for in section 865), or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from further or other proceedings, civil or criminal, for the same cause."

The defendant alleges in his statement of defence that an information was laid on behalf of the plaintiff charging the defendant with unlawfully shooting and wounding the plaintiff with intent to do him grievous bodily harm and which charge was reduced by the justices to one of common assault, and he claims the benefit of sections 265, 864 and 866 of the Code. Section 865 provides for giving a certificate of dismissal. Section 866 is the section material to this action and it provides that in case of conviction the person accused (subject to the conditions precedent therein expressed) shall be released from further or other proceedings civil or criminal for the same cause. From the language of section 866 it appears clear that the release thereby provided for can become operative

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LISTER,
J.A.

only upon the antecedent conditions prescribed by the statute being strictly complied with.

These conditions are: (a) a complaint being preferred for assault or battery by or on behalf of the person aggrieved; (b) a conviction on this complaint; (c) payment of the fine, etc., imposed, or (d) suffering the imprisonment awarded.

The obvious reason for imposing the first condition is that the person aggrieved shall not without his own consent be deprived of his civil remedy: *Nicholson v. Booth* (1888), 16 Cox C. C. 373.

For the purposes of this action I do not think it necessary to consider whether that portion of section 866 which provides for the release of the civil action for damages is *intra vires* the Parliament of Canada, nor whether the justices had jurisdiction to convict of a common assault when the charge laid was wounding with intent, an indictable offence over which the jurisdiction of the justices is limited to committing for trial if in their opinion the evidence is sufficient to put the accused on his trial.

That no complaint was preferred by the plaintiff or by any other person on his behalf for assault or battery is undisputed.

The charge laid by the officer was for wounding with intent, and without considering whether a conviction for common assault could be made on this charge, it appears to me it was not laid by the officer on behalf of the plaintiff (the person aggrieved), but it was laid by the officer in the discharge of what he considered his duty as such officer without regard to the plaintiff; he was acting on his own behalf as an officer and not on behalf of the plaintiff. Such being the case I am of opinion that the statute does not and could not operate as a bar to the plaintiff's action: *Nicholson v. Booth* (1888), 16 Cox C. C. 373.

It was argued at bar that the plaintiff by his presence at the investigation by the justices acquiesced in what was done, and cannot now be heard to object. I cannot accept this view; he was present as a witness, subpoenaed as such

to give evidence on the charge laid by the officer, viz., wounding with intent. Upon the evidence I conclude he was present as a witness on the charge as laid and not as prosecutor: *May v. Reid* (1889), 16 A. R. 150. There is no evidence to shew that the justices amended the information assuming they had jurisdiction to do so, nor when they decided to convict the defendant of a common assault; it may be, for all that appears, that they so decided after the parties had left the court.

Judgment.
 LISTER,
 J.A.

I think that the appeal should be allowed.

MACLENNAN, and MOSS, JJ.A., concurred.

Appeal allowed.

R. S. C.

HENDERSON V. CANADA ATLANTIC RAILWAY COMPANY.

Railways—Highway Crossing—Statutory Warning—Damages—Mental Shock.

The statutory warning required to be given where a line of railway crosses a highway on the level is for the benefit, not only of persons crossing the line of railway, but also of persons lawfully using the highway and approaching the line of railway.

Where, therefore, owing to the failure of the defendants to give the statutory warning, or any equivalent warning, the plaintiff drove close to their line of railway and his horses were frightened by a passing engine and injury resulted, he was held entitled to recover.

Damages for "mental shock" are not recoverable.

Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, followed.

Judgment of MACMAHON, J., affirmed.

THIS was an appeal by the defendants from the judgment of MACMAHON, J. Statement.

The following statement of the facts is taken from the judgment of MOSS, J. A.

The plaintiff's ground of action is that by reason of negligence on the part of the defendants the plaintiff's horses attached to his carriage, containing himself and his

Statement. son and driven by his coachman, ran away; upsetting and breaking the carriage and injuring the plaintiff and themselves.

The accident occurred on Elgin street, one of the principal highways in the city of Ottawa. It is a thoroughfare much frequented and used by citizens of Ottawa and others going to and from the city.

At a point about 190 feet south of Catherine street, which crosses Elgin street at right angles, Elgin street is crossed on the level by the main line or track of the defendants' railway, and on the north and south sides of the main line there are sidings or switches, which are here used for shunting purposes, the place on either side of the highway forming part of a railway yard in constant use by the defendants in connection with their business.

A watchman or flagman in the employ of the defendants is usually stationed at the crossing to signal trains and engines crossing the highway and to warn persons approaching on the highway.

On the day of the accident the plaintiff was driving south on Elgin street in the direction of the railway crossing, intending to proceed, after visiting a patient, to his summer residence on the Rideau.

The driver, seeing the flagman at the crossing evidently on the look-out for the approach of an engine or train, stopped his horses at a point to the north of the north side of Catherine street and remained there until he saw an engine, spoken of in the evidence as No. 5, cross the highway going westward.

At this time there was a loaded cart drawn by one horse which had stopped about 200 feet further south than the plaintiff's carriage.

After engine No. 5 had crossed, the cart moved on. According to the plaintiff and his driver, the flagman folded up his flag and turned facing south and walked away towards the flagman's shanty, situate to the east and south of the centre of the crossing of the main line where he had been standing, and the driver thereupon drove

on towards the tracks and continued without seeing an engine or anything moving on the tracks until the horses had reached the most northerly track. Statement.

About the same time that the plaintiff's carriage moved southward towards the tracks, the defendants' engine No. 1 commenced to move along the main line westward towards the highway from a point to the east, where it had been switched on to the main line.

When the plaintiff's horses had reached the most northerly track the plaintiff and his driver became aware of the engine coming rapidly up on the main line, which crosses the highway about fifty feet south of where the horses were.

The horses were immediately turned and headed up Elgin street, but owing, as the plaintiff alleged, to the fright occasioned by the sudden and unexpected appearance of the rapidly approaching engine and the noise it made in crossing, they became unmanageable.

One of them reared violently, and in doing so broke the pole strap attached to his collar and fell, tearing away the other horse's bridle. The driver thus lost control and the horses ran away, with the result already stated.

The action was tried at Ottawa in January, 1897, before MACMAHON, J., and a jury.

The following were the questions submitted to the jury and their answers thereto:—

1. At what distance from Elgin street crossing did No. 1 engine start westward? About 300 feet.

2. When the engine started westward, was the bell rung and did it continue ringing at short intervals until it crossed Elgin street? It did not ring.

3. If you find the bell was not rung as mentioned in question No. 2, did the neglect to so ring the bell cause the driver of Dr. Henderson's carriage to do any act which he would not otherwise have done? Yes.

4. What was such act? Drove forward.

And did it contribute to the accident? Yes.

Statement. 5. Was engine No. 1, when going west and before it reached Elgin street, running faster than six miles an hour? If so, how fast? Believe train was going over six miles an hour; not competent to say how much faster.

6. Did the flagman give warning to the plaintiff's driver not to cross? Do not believe that flagman raised his hand.

7. Did the horses rear or bolt before or after the engine crossed Elgin street? After.

8. What caused the horses to rear and bolt? Fright from engine.

9. Was the pole-strap reasonably fixed for the purpose for which it was used? Yes.

10. Is the injury of which Dr. Henderson complains wholly due to mental shock, or is it attributable partly to mental shock and partly to shock caused by a blow? Partly from shock and blow.

At what do you assess the damages?

(a) In respect of injury to horses, carriage and harness? \$380.

(b) In respect of personal injury resulting exclusively from mental shock? \$600.

(c) In respect of shock caused by blow or blows? \$400.

Upon these findings the learned Judge entered judgment in the plaintiff's favour for \$780, items (a) and (c).

Both parties appealed, the defendants contending that they were not liable at all, and the plaintiff contending that he was entitled to recover the damages for mental shock.

The appeal and cross-appeal were argued before BURTON, C. J. O., MACLENNAN, MOSS, and LISTER, J.J.A., on the 14th and 15th of September, 1898.

Osler, Q.C., and *Chrysler*, Q.C., for the defendants. The findings of the jury were not justified by the evidence and should be disregarded. Even as they stand, however, the

Argument.

judgment is wrong. It proceeds on the erroneous assumption that there was a breach of some statutory duty. But the statutory obligation to give warnings at highways does not apply when an engine is being used as this one was on the lands of the railway company itself, and if the company take reasonable precautions to prevent a collision, they fulfil their duty to the public. They are not responsible for injuries resulting from horses becoming frightened at the noise made by engines: *Buxton v. North Eastern R. W. Co.* (1868), L. R. 3 Q. B. 549; *Roe v. Village of Lucknow* (1893), 21 A. R. 1; *Simkin v. London and North Western R. W. Co.* (1888), 21 Q. B. D. 453; *Shoebrink v. Canada Atlantic R. W. Co.* (1888), 16 O. R. 515; *Casey v. Canadian Pacific R. W. Co.* (1888), 15 O. R. 574; *New Brunswick R. W. Co. v. Vanwart* (1889), 17 S. C. R. 35; *Hurd v. Grand Trunk R. W. Co.* (1888), 15 A. R. 58.

Wallace Nesbitt, and *Glyn Osler*, for the plaintiff. There is ample evidence to support the findings, and the defendants are liable. They neglected to give any warning that the engine was approaching, and such warning they were bound to give either in the mode prescribed by the statute or in some equivalent and equally satisfactory one: *Rosenberger v. Grand Trunk R. W. Co.* (1884), 9 S. C. R. 311; *Hollinger v. Canadian Pacific R. W. Co.* (1893), 20 A. R. 244. The damages ought to be increased. The jury, in speaking of mental shock, evidently mean illness resulting from mental shock; it is now well known that mental shock may cause illness, and the case of *Victorian Railways Commissioners v. Coultas* (1888), 13 App. Cas. 222, does not apply. It has, moreover, been disapproved of by the Courts of Appeal in England and Ireland: *Pugh v. London, Brighton and South Coast R. W. Co.*, [1896] 2 Q. B. 248; *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Bell v. Great Northern R. W. Co.* (1890), 26 L. R. Ir. 428. The distinction was not drawn there between mental shock, strictly so called, and mental shock causing physical injury.

Osler, Q.C., in reply.

Judgment. November 15th, 1898. The judgment of the Court was
Moss, delivered by
J.A.

Moss, J. A.:—

The amount of damages awarded is not complained of by the defendants but the plaintiff has entered a cross-appeal in respect of the damages on the ground that the sum of \$600 which the jury assessed as damages in respect of personal injury resulting exclusively from mental shock, should also have been awarded to him.

Upon the findings and the evidence we think we must, following *Rosenberger v. Grand Trunk R. W. Co.* (1882), 32 C. P. 349, (1883) 8 A. R. 482, and (1884) 9 S. C. R. 311, and *Hollinger v. Canadian Pacific R. W. Co.* (1892), 21 O. R. 705, and (1893) 20 A. R. 244, hold the defendants responsible for the accident of which the plaintiff complains.

It was strenuously contended that the findings were against the evidence. Upon many of the questions submitted the evidence was conflicting, and we may appropriately apply to it the remark of my brother Osler in the *Rosenberger* case, 32 C. P., at p. 360, that "the evidence on these points, as is usual in such cases, was extremely contradictory, and if the jury had yielded to that of the defendants one might have felt that there was greater likelihood of their being right." But he adds (p. 361): "The matter was one entirely for them and there is a good deal of evidence in support of their conclusion," which is also the case in this instance. See, too, the observations of Lords Cairns, Selborne, and Gordon, in *Dublin, Wicklow, etc., R. W. Co. v. Slattery* (1878), 3 App. Cas. 1155.

The defendants did not ask for or obtain a finding of want of reasonable care or skill in the management of the plaintiff's horses or want of proper caution in looking out for and guarding against the approach of the engine.

In the *Rosenberger* case, in the Supreme Court, Mr. Justice Gwynne, by whom the judgment of the Court

was pronounced, in dealing with the objection that the defendants' liability for accidents at railway crossings arising from neglect to observe the statutory precautions as to ringing the bell or sounding the whistle, was confined to cases of actual collision, said (p. 320): "We entirely concur in the opinion of the learned Judges of the Common Pleas Division and of the Court of Appeal, * * namely, that the benefit of the 104th section, chapter 66 of the Consolidated Statutes of Canada, is not confined to the case of persons injured in person or property by actual collision with an engine or train crossing a highway * *. It clearly, as we think, applies to, and must be construed as inuring to the benefit of, all persons who, using the highway which is crossed by a railway on the level, receive damage, either in their persons or in their property, from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by the statute, whether such damage arises from collision or is occasioned in any other manner by the neglect referred to." This view was adhered to in *Grand Trunk R. W. Co. v. Sibbald* (1891), 20 S. C. R. 259.

Judgment.

Moss,
J.A.

In the case now in review there is evidence of obstruction of the view of persons travelling southward in the direction of the tracks on the day of the accident, caused by sheds on the railway premises and cars standing on sidings.

There was no ringing of the bell or sounding of the whistle, and the jury found that the flagman failed to take the usual or any precautions for warning the plaintiff or his driver of the approach of the engine.

We have, in fact, a finding that the defendants did not take proper and sufficient or reasonable precautions to guard against an accident, having regard to the dangerous character of the crossing, and that the failure to do so led to the accident: *Bilbee v. London, Brighton, etc., R. W. Co.* (1865), 18 C. B. N. S. 584; *Stapley v. London, Brighton, etc., R. W. Co.* (1865), L. R. 1 Exch. 21; *James v. Great Western R. W. Co.*, noted in *Skelton v. London and North-*

Judgment. *Western R. W. Co.* (1867), L. R. 2 C. P., at p. 634; *Coburn v. Great Northern R. W. Co.* (1891), 8 Times L. R. 31 (n.).
Moss,
J.A.

If there had been actual impact, or collision, the case would have been very similar to these.

And *Rosenberger's* case shews that impact is not essential where the cause of the accident was the neglect of the railway company to observe proper precautions.

Whether or not, under the circumstances, the defendants were guilty of negligence from which the plaintiff suffered injury was properly for the jury, and it was submitted upon a charge of which the defendants could not reasonably complain.

We think that the plaintiff is entitled to retain the judgment entered in his favour.

The remaining question arises upon the cross-appeal.

It was argued for the plaintiff that the decision of the Judicial Committee in the case of *Victorian Railways Commissioners v. Coultas* (1888), 13 App. Cas. 222, has not been generally accepted as an authority, and that this Court should not consider itself bound by it.

Undoubtedly it has excited much comment, and in some tribunals which have felt themselves at liberty to disregard it, it has not been adopted.

It has been pointed out that the Committee seems to have failed to distinguish between mental shock in the sense of an emotion of the intellectual feelings, and nervous shock as expressing a physical disorder of the nervous system; and it has been argued that nervous shock is merely a natural and direct result of any sudden and violent terror, quite independent of the "moral" feelings, and if the nature of the occurrence be such as to make the terror not unreasonable in an ordinary individual, damages should be as properly awardable as in a case of bodily hurt from direct impact.

The considerations weighing against the decision and the cases in which it has been discussed are noted in *Beven on Negligence*, 2nd ed., p. 67: and see *Parsons' Liability of Railway Companies*, pp. 20-23.

Whatever weight may be or ought to be given to these views by other Courts, it is now incumbent on this Court to accept and follow that case as a decision of the ultimate Court of Appeal for this country.

The evidence of the medical men as to the nature of the nervous shock and its effect upon the plaintiff brings this case fairly within the rule laid down by the Judicial Committee, and we must treat the matter as concluded so far as we are concerned.

The appeal and cross-appeal should be dismissed with costs, with the right of set-off.

Appeal and cross-appeal dismissed.

R. S. C.

BAKER V. STUART.

Devolution of Estates Act—Dower—Election—R. S. O. ch. 127, sec. 4.

Where in the administration by the Court of the estate of an intestate lands have been sold and the purchase money paid into Court and not distributed, the widow may, although more than twelve months have elapsed since the death of her husband, elect to take in lieu of dower her distributive share under the Devolution of Estates Act. Judgment of BOYD, C., 29 O. R. 388, affirmed.

THIS was an appeal from the judgment of BOYD, C., reported 29 O. R. 388.

The question was whether the widow of an intestate could elect, more than twelve months after his death, to take her distributive share in lieu of dower, the intestate's lands having been sold under the direction of the Court in administration proceedings, and the proceeds being at the time in Court. The facts are stated in the report below, and the line of argument is there indicated.

The appeal was argued before BURTON, C.J.O., MACLENNAN, MOSS, and LISTER, J.J.A., on the 4th of October, 1898.

J. H. Moss, for the appellants.

Armour, Q.C., for the respondent.

Judgment.

Moss,
J.A.

Statement.

Judgment. November 15th, 1898. MACLENNAN, J.A.:—

MACLENNAN,
J.A.

I am of opinion that this appeal fails. Mr. Moss presented several ingenious arguments in support of his contention, but I think we can not give effect to them to deprive the widow of her right to elect between dower and a distributive share of the proceeds of the land. The learned Master at Cornwall thought he was precluded by the terms of the judgment of reference from allowing an election. That judgment was pronounced by way of construing the testator's will, one contention before the Court having been that the widow was put to her election by the terms of the will between her dower and a bequest given to her by the third clause thereof. The Court decided that question in the widow's favour; and also declared that she was entitled to the whole of the testator's personal estate, subject to the payment of debts, funeral and testamentary expenses, and was also entitled to dower in the real estate whereof he died possessed.

I think it is perfectly clear that the judgment was not intended to decide, and does not in terms decide, anything whatever with regard to the widow's right to elect to take a distributive share of the real estate descended instead of her dower therein, under the provisions of the Devolution of Estates Act. The learned Chancellor merely decided that she was entitled to the personal estate given to her by the will, and that she could take that and her dower out of the land as well. It was this decision which gave her the other right of election which is now in question. If she had no right of dower she could have had no right of election.

Another argument was made by Mr. Moss, that by section 1 of the Act 54 Vict. ch. 18 (O.), the widow was impliedly limited to one year from her husband's death to make her election between her dower and a distributive share. He argued that, because unless a caution was registered by the executor or administrator, within a year, the estate would shift from the personal representative to the heir or

heirs-at-law, the widow's right to claim a distributive share was necessarily extinguished at the end of the same period. There is nothing express in the section, nor any where else in the statute, limiting the widow's right to make her election to a year, and I think it would be a most unwarranted construction to hold that she was so limited by implication. In many, if not in most cases, a widow could not make a wise or prudent or safe election within a year. Until debts are ascertained and cleared it cannot be known what the amount or value of a distributive share can be, and until that is known an election by the widow would be a farce. The Legislature meant her right of election to be of some value, a right to take what was most for her advantage, and if it meant to limit it, as contended for, would have done so expressly. It is a rule that the Legislature does not take away rights by mere implication and here there is as little ground for any such implication as can well be imagined.

Judgment.
MACLENNAN,
J.A.

In the present case there is no difficulty in the way of an election, no inconvenience or loss to any one. The estate is in Court, the land having been sold, and the sole question is whether the widow is to have half absolutely, or the value of a life estate in one-third.

I think that the appeal should be dismissed.

Moss, J.A. :—

The will of the testator did not expressly put the widow to her election between the benefits given to her and her dower, and one of the questions raised for determination at the trial was whether by implication she was put to her election.

The judgment pronounced declared her entitled to all the testator's personalty and also to dower out of his realty, but it determined nothing adverse to the exercise by her of the right to choose between her dower and her share or interest in the testator's undisposed of real estate, under sec. 4 (1) and (2) of the Devolution of Estates Act.

And I do not think there is anything in the judgment

Judgment.

Moss,
J.A.

as issued to prevent her from so electing. The only question is as to the time within which the election is to be made.

Sub-sec. 2 of sec. 4 enacts that a widow may by deed or instrument in writing elect to take her interest in her husband's undisposed of real estate in lieu of all claims to dower. Further on it provides that unless she so elects she shall not be entitled to share under the section in the undisposed of real estate.

By sub-section 1 it is declared that the property of a deceased not disposed of by deed, will, contract, or other effectual disposition shall be distributed as personal property not so disposed of is thereafter to be distributed.

The object of the execution by the widow of the deed is that she may thereby bring herself within the latter provision and prevent her exclusion under the concluding words of sub-section 2.

No time limit is expressly imposed and it does not seem unreasonable to say that as long as the undisposed of real estate or the proceeds thereof in the case of a sale remain undistributed the widow may exercise the right given to her.

She is only required to declare her election as a condition precedent to participating in the undisposed of real estate, and there appears no good reason for limiting, in all cases, the time within which she must make her declaration to a year from the death of the deceased.

No doubt she may as in other cases of election debar herself by her acts and conduct from electing against her dower, but that is a question to be determined upon the facts in the particular case.

In this case the litigation rendered necessary by the terms of the testator's will has delayed distribution, and the property is only now about to be distributed. But before that has been done the widow has declared her election, and I think she has done so in good time.

BURTON, C.J.O., and LISTER, J.A., concurred.

Appeal dismissed.

R. S. C.

HESKETH V. THE CITY OF TORONTO.

Municipal Corporations—Fire Department—Negligence—Damages

Though municipal corporations are not bound by law to establish and manage a fire department, yet if they do so they are liable for injuries caused by the negligence of the servants employed by them therein while in the performance of their duties.

Seymour v. Township of Maidstone (1897), 24 A. R. 370, distinguished. Judgment of ARMOUR, C.J., affirmed.

THIS was an appeal by the defendants from the judgment of ARMOUR, C. J. Statement.

The plaintiff was the mother of a boy named Percy Hesketh, and brought the action to recover damages for his death. While he was standing in a public street, in the city of Toronto, looking at a burning building, he was knocked down and killed by the runaway horses of one of the steam fire engines.

The action was tried at Toronto, on the 29th of March, 1898, before ARMOUR, C. J., and a jury, who, on very conflicting evidence, found a verdict in the plaintiff's favour for \$1,000, her successful contention being that the horses had not been kept under proper control.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 14th of October, 1898.

Fullerton, Q. C., and *W. C. Chisholm*, for the appellants. There was in fact no negligence, and the verdict was perverse. Even if there was negligence, the city is not liable. There is no obligation to organize and maintain a fire brigade. Protection from fire is a function of the public government, and in affording that protection the city act as a representative of the public government and incur no liability by reason of the negligence of the officers selected by it: *Atkinson v. Newcastle Water Works Co.* (1877), 2 Exch. D. 441; *Cowley v. Newmarket Local Board*, [1892] A. C. 345; *Pictou v. Geldert*, [1893] A. C. 524.

Argument. *George Wilkie*, for the respondent. The jury's finding on conflicting evidence cannot be disturbed, and the legal objection is not tenable. The fire brigade is organized and maintained by the city, and the city has the power of appointment and dismissal. This is the test of liability. Having voluntarily assumed the duty which the statute permits them to assume, they are liable for any misfeasance: *Whitehouse v. Fellowes* (1861), 10 C. B. N. S. 765; *Sanitary Commissioners of Gibraltar v. Orfila* (1890), 15 App. Cas. 400; *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93; *Gilbert v. Corporation of Trinity House* (1886), 17 Q. B. D. 795. Liability of this kind was imposed in *Joyce v. Metropolitan Board of Works* (1881), 44 L. T. N. S. 811, under very much the same statutory provisions. *Fullerton*, Q. C., in reply. In the *Joyce* case this objection was not raised.

November 15th, 1898. BURTON, C. J. O.:—

The question of negligence was submitted to the jury in a way of which the defendants had no reason to complain, and did not complain, and in all probability there would be a similar verdict if the case were submitted to another jury. The only point I have thought it necessary to consider is the question of the liability of the corporation for the acts or neglect of the firemen under the facts in evidence.

In this Province the Legislature has created the inhabitants of every city into a corporation, with authority in their corporate capacity to exercise certain specified powers of legislation and regulation with respect to these local and internal concerns, and so far as these powers are granted for public purposes exclusively they belong to this corporate body in its public or municipal character, and no action is maintainable against them, unless specially given by statute, but if the Legislature, in addition to these powers, had chosen to confer upon them power to carry on gas or water works for private gain these powers would be

regarded as entirely distinct and separate from those appertaining to the defendants as a municipal body, and *quoad* such powers and their exercise they would be regarded as a private company and subject to the responsibilities attaching to that class of institutions.

In other words, whilst no private action would lie against a municipal corporation for damages sustained by reason of its neglect to perform a public duty, it would be civilly liable for damages resulting from acts done in what is sometimes called its private character; that is in the management of property and rights which it has voluntarily assumed for its own advantage or profit as a corporation, although enuring ultimately to the benefit of its citizens.

But there is a third class of cases in which the city has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, as in this case, where the injury resulted from the alleged negligence of members of the fire department, upon which there may be, and has been in the neighbouring States, a wide divergence of opinion. I may say at once that, in my opinion, if there was a duty or obligation cast upon the council to form such a department, even though the members might be appointed by the city council and paid by them, and liable also to dismissal by them, they could not be regarded as servants, or agents, for whose negligence, or want of skill, in the performance of their duties the corporation could be made liable, but in such case they would be acting as officers of the city charged with the performance of a certain public duty, and no action would lie against the city for their negligence whilst acting in the performance of these duties.

In the present case there is no legislation creating separate officials with specified duties as a fire department. The city may in its discretion pass by-laws for appointing fire wardens, fire engineers and firemen, and for promoting, establishing and regulating fire companies. What it has done is to assume the control of a fire department, appoint-

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ing the members, paying them, and controlling them by certain regulations, with the right to dismiss them, and furnishing them with the engines and other appliances necessary for the extinguishing of fires.

I quite concede that if they had rendered aid merely to voluntary fire companies the relation of master and servant, or even that of principal and agent, would not necessarily have been created, but that is not what has been done; I am unable to say that the learned Chief Justice has not come to the right conclusion when he holds that these men were the mere servants of the corporation, and that the doctrine of *respondeat superior* applies, so that his judgment should be affirmed.

OSLER, J. A. :—

This case does not appear to me to present any feature of special difficulty, although the point of law raised by the defendants is no doubt an important one.

The action is brought under the Fatal Accidents Act, R. S. O. ch. 166, for the loss sustained by the plaintiff in the death of her son, which was caused, as it is alleged, by the negligence of the defendants' servants in managing a steam fire engine, the property of the defendants. Apart from the question whether there was any evidence of negligence for the jury, the defence relied upon is thus stated in the 2nd, 3rd and 4th reasons of appeal.

2nd, 3rd.—There is no duty imposed upon the corporation of Toronto to maintain a fire department or apparatus, but what is done by them is a voluntary act in aid of the protection of property under the permission of the statute, in which case there is no liability other than is imposed by this statute.

4th.—The protection of property is a governmental and not a municipal function, and in performing such function under statutory authority the corporation is no more liable than the Government would be.

The Municipal Act, R. S. O. ch. 223, sec. 537, sub-

sec. 6, enacts that by-laws may be passed by the councils of cities, towns and villages "for appointing fire wardens, fire engineers and firemen, and for promoting, establishing, and regulating fire companies, hook and ladder companies, and property saving companies."

Section 542 empowers councils to pass by-laws imposing regulations of various kinds, and appointing officers who may see to their enforcement, relating to the protection of property from fire.

These are the only clauses of the Act the defendants rely upon.

Section 543 may be referred to, which gives the council power to contract for a supply of water within the municipality "for fire purposes and other public uses," from hydrants and otherwise as may be deemed advisable; and for renting hydrants, and for purchasing or renting "fire apparatus of any kind and fire appliances and appurtenances belonging thereto respectively."

A by-law of the defendants provides that the standing committee on fire and light shall have the management and control of the fire department, and shall have full power and authority over its organization and government, and shall have control of the buildings, engine houses, engines, hose, hose carts, trucks, ladders, horses, apparatus, equipment, telegraph alarms and line, and all other property and furniture belonging to the department. Clause 3 provides that the fire department shall consist of certain specified officials, and such other officers and members as may from time to time be appointed by the standing committee on fire and light, and approved of by the council. Clauses 6 and 7 provide that the chief of the department shall be appointed, and his salary fixed, by the council, and that all other officers and members shall be appointed by, and may be removed by, the committee, by whom also their salary may be fixed, subject to the approval of the council. Clause 17. Until the council shall have purchased a sufficient number of horses to draw the engines and other apparatus to and from fires, they may contract

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“for securing the services of such good and efficient horses and drivers as they may consider necessary for hauling and driving the engines and other apparatus,” etc. 18. The whole apparatus and management shall be under the direction of the chief of the department, subject to the instruction of the committee, and at every fire the chief, or in his absence the senior officer present, shall have sole control over all engines, property, members and officers of the department.

Rules for the organization and management of the department were made by the defendants' council, *inter alia* rules for the conduct of the engineers and the appointment of drivers.

It was admitted that the engine and horses which caused the accident in question were the property of the defendants.

Whether the by-law, parts of which I have extracted, is such a by-law as is contemplated by the 6th sub-section of section 537, may admit of question. Its effect seems to be that instead of appointing and establishing the officers and fire companies as officers and companies acting independently of the corporation, though they may be appointed and regulated and even paid by them, the council assumes, through its committee, the whole management and direct control of a fire department as a part of the affairs and business of the corporation, the officers and men employed being their officers and servants, appointed and removable at pleasure, and the fire engines and other apparatus being their property, managed and used by their servants under their direction.

The contention of the defendants is that as the establishment and maintenance of the fire department was voluntary on their part—something which they were by statute permitted, though not bound, to do—they are not liable for the negligence of those employed by them; and secondly, that in relation to such a department they are merely servants of and acting for the benefit of the public in the same sense that a public officer who has the man-

agement of some branch of the Government business is a servant of the Government, and who as such is not responsible for the negligence or default of those in the same employment as himself.

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J.A.

It appears to me that neither of these contentions is for a moment maintainable. Having regard to our system of municipal institutions and the power devolved by the Legislature upon municipal corporations, they place these bodies upon much too lofty a plane. While each such corporation within its own limits, and to the extent of its legislative powers, may be said in a sense to be itself the public, yet it is not a department of the general government, a principal which cannot be sued, but a corporation capable of being sued as such, a principal against which recourse may be had by action for breach of duty where a duty or obligation is attached to or imposed upon it, or implied by law, just as any other corporation or a private person may be sued under similar circumstances. As is said by Blackburn, J., in *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93, at p. 110: "In the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things."

And this, as the same case shews, is quite independent of whether the corporation derive any benefit or profit from the works they have undertaken, as, for example, in the case of gas or water works, or whether they carry them on simply for a public purpose or the public benefit without profit. In *Foreman v. Mayor of Canterbury* (1871), L. R. 6 Q. B. 214, an action against a local board of health for negligence of their servants in leaving a heap of stones on a public way unguarded, the same learned Judge, referring to the case just cited, said that it was there decided that a public body like the local board of health were answerable for the negligence of their servants just as if they were acting as the servants of a private person and not for a

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J.A.**

corporation incorporated for a public purpose. The rule and the exception are thus stated in Dillon on Municipal Corporations, 4th ed., sec. 974: "On general principles it is necessary, in order to make a municipal corporation impliedly liable on the maxim *respondeat superior* for the wrongful act or neglect of an officer, that it be shewn that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation." And again: "If the duty, though devolved by law upon an officer elected or appointed by the corporation, is not a corporate duty, the officers of the corporation performing it do not act for the corporation, and hence the corporation, unless expressly declared to be so by statute, are not liable for the omission to perform it or for the manner in which it is performed." There is nothing in our Municipal Act that I am aware of which exempts a municipal corporation from liability where, as in the case at bar, the persons whose negligence is complained of are the servants of the corporation and not independent officers fulfilling duties imposed upon them by statute, not being duties of or assumed by the corporation, and not subject to the control or direction of the corporation, though they may have been appointed by the corporation, as in the case of the engineer acting under the Ditches and Watercourses Act in *Seymour v. Township of Maidstone* (1897), 24 A. R. 370.

These considerations seem to me sufficient to dispose of both of the objections urged on behalf of the defendants. The council are not bound to maintain a fire department, or to assume the duty of managing one as part of the work of the corporation. Neither are they bound to construct and establish sewers, or water or gas works. But if they do, it is clear that the law imposes upon them the obligation to use reasonable care that no unnecessary damage be

done. I do not see how they are in a different position in regard to their fire department. They have chosen to create it by by-law and to provide for the carrying it on by themselves through the medium of a committee of their council and of officers and servants appointed by themselves or the committee. The apparatus which is used and the servants who manage it are theirs, and the negligence of the latter in the course of their employment is therefore the negligence of the defendants. The fact that the work is undertaken by them for public convenience and not for profit makes, as I have said, no difference. If they volunteer to undertake it they are bound to see that they do not, by the negligent acts of their servants, inflict injury upon those whose situation calls for the exercise of reasonable care. That this is the legal position in which the defendants stand I regard as established by the authorities I have referred to, to which may be added *Gilbert v. Corporation of Trinity House* (1886), 17 Q. B. D. 795 ; *Winch v. Conservators of the Thames* (1874), L. R. 9 C. P. 378 ; *Sanitary Commissioners of Gibraltar v. Orfila* (1890), 15 App. Cas. 400 ; *Garfield v. City of Toronto* (1895), 22 A. R. 128 ; *Noble v. City of Toronto* (1882), 46 U. C. R. 519.

Judgment.

OSLER,
J.A.

On the question of negligence, while I was much impressed by Mr. Fullerton's able argument, it is impossible to interfere with the verdict of the jury. It was for them to say whether under all the circumstances the recollections and impressions of the plaintiff's witnesses were not more accurate and reliable than those of the witnesses for the defendants.

I am of opinion that the appeal should be dismissed.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

Appeal dismissed.

R. S. C.

MILES V. ANKATELL.

Fixtures—Mortgagor and Mortgagee—Wooden Building.

A small building of thin board, lathed and plastered inside, and divided into three rooms, resting by its own weight on loose bricks laid on the soil, built for and used at first as a booth or shop and then for a time as a dwelling house, was held to be a fixture in an action by the mortgagee of the land, although the building was placed on the land, after the mortgage was made, by the mortgagor's husband who swore that it was placed on the land without any intention of leaving it there permanently.

Judgment of a Divisional Court, 29 O. R. 21, reversed.

Statement. THIS was an appeal by the plaintiff from the judgment of a Divisional Court, reported 29 O. R. 21.

The question was whether, as claimed by a mortgagee of certain land, a small wooden building placed on the land after the making of the mortgage was a fixture and subject to the mortgage. The facts are stated in the report below.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 21st and 22nd of September, 1898.

J. Bicknell, for the appellant. Evidence of the intention of the parties at the time the building was placed on the land was not admissible: *Hobson v. Gorringe*, [1897] 1 Ch. 182, but even if admitted it does not prove that this building was a mere chattel. A very important fact is that the building was erected on the land; not made elsewhere and then brought to the land, and it is not readily removable. *Wiltshier v. Cottrell* (1853), 1 E. & B. 674, is relied on in the judgment below, but that case does not apply. The building in question there was brought to the land and was standing on it by its own weight; it was merely a contrivance for the convenience of the tenant, and movable from place to place. The case is referred to in *Bunnell v. Tupper* (1853), 10 U. C. R. 414, and the distinction between such a contrivance and a building strictly so called is

pointed out. The test there suggested is whether the building is put up as incident to the enjoyment of the land, and that was clearly the purpose in view here. In *Bald v. Hagar* (1860), 9 C. P. 382, the same view is taken, and a building resting on posts was held to be part of the land. In *Phillips v. Grand River Farmers' Mutual Fire Insurance Co.* (1881), 46 U. C. R. 334, many of the authorities are considered, and the same result arrived at. While impossibility of removal without injury to the freehold is not the test, the fact is of importance in deciding the question: *Climie v. Wood* (1868), L. R. 3 Exch. 257; (1869) L. R. 4 Exch. 328.

W. J. Clark, and *G. H. Galbraith*, for the respondent. Whether the building is or is not a fixture is a question of fact, and on the evidence it is clear that it was put up for temporary use and not with the intention of making it part of the freehold. There was no foundation, and no affixing to the soil; it was merely a large box resting on the ground.

J. Bicknell, in reply.

November 15th, 1898. The judgment of the Court was delivered by

OSLER, J. A. :—

The point is whether, as between the plaintiff, a mortgagee in fee of the land, and the defendant Wm. AnkateLL, a stranger, the structure erected by the latter on the land, subsequent to the mortgage, and without the consent or knowledge of the mortgagee, is, or is not, a fixture, and removable by the defendant who claims to be the owner of it. It is thus described in the evidence: "A small wooden building, built up against the house to the east (which is also on the land mortgaged) and partly to the next house on the west, coming out to the street line in front. It has been sunk down in the ground a little excepting in front. There are boards round the bottom, so that you cannot tell

Judgment.

OSLER,
J.A.

whether it is on posts or just lying on the ground. Q. Any excavation made? A. In the back they have dug it out some in order to make it level, I suppose. There are three rooms in it, no upstairs, just one storey: flat roof, the back part would be a small place covered with shingles: did not see the roof of the other, but would say it is covered with gravel: clapboarded on the outside and of very flimsy or the lightest possible construction. If removed there would probably have to be some filling in done afterwards, eight or ten inches or a foot in depth, there is some banking in front."

For the defence an architect said that the structure appeared to have been built in three separate pieces, no two exactly alike, just laid on the ground; that he had a man dig underneath and he could find no foundation; that the cost of it would be about \$150; that it was no improvement to the property and spoiled the adjoining house. The defendant said that he put up the building with the consent of his wife, the co-defendant, the mortgagor, for the purpose of a store, and that as the store did not "go," he turned it into a dwelling house. He had permission to put up a light building there just to try it and see what could be done with it, a building of his own which she agreed he might remove if he could not make it "go" as a store. He kept store in it some time and it was afterwards rented by the mortgagor as a dwelling house.

Had the structure in question been erected by the mortgagor, whether before or after the mortgage, it would, I apprehend, have been difficult for her, in the absence of any consent, express or implied, by the mortgagee that it should be removable, to have successfully asserted against him that it had not become part and parcel of the mortgaged land. As against a stranger the mortgagee cannot be in a worse position. The building was erected on the land for the purpose of being used there as a shop and capable of being used, as it was afterwards rented and used, as a dwelling house. Such a structure, even though attached to the land no otherwise than by its own

weight, is necessarily looked at from a somewhat different point of view as regards the question of annexation to the land than a piece of machinery or other weighty article, which is itself constructed as a mere distinct chattel capable of being removed from one building or parcel of land to another for use in a mill or factory or other building.

The agreement between the defendants that the building should remain a chattel cannot prevent it from becoming a part of the freehold, nor is that a circumstance from which it is permissible as against the mortgagee to infer a contrary intention. "The circumstance to shew intention is the degree and object of the annexation which is in itself apparent, and thus manifested the intention:" *Hobson v. Gorringe*, [1897] 1 Ch. 182, at p. 193. Here, so far as the thing itself is concerned, the circumstances which are apparent to shew intention to make it part of the land are its very nature, and the uses for which it appears to be designed. It is placed on the land—built there—for the better use and enjoyment of the land, and apart from the land is of little or no value except as so much lumber or boards. In this instance it may be said to rest on the land by its own weight in the sense that it is not fastened by mortar, etc., to any foundation and has no other foundation than the earth, yet it was fitted, as it were, to the soil, and for that purpose a slight, it may be said, a very slight, disturbance of the soil was necessary, and in the event of its removal a similar disturbance would be necessary in order to restore it to its original condition. If that, in the case of such a building, were necessary to confer upon it the character of a fixture, I think it is found here, and, therefore, that the appeal should be allowed and the judgment of the trial Judge restored. I refer to *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Wiltshear v. Cottrell* (1853), 1 E. & B. 674; *Haggert v. Town of Brampton* (1897), 28 S. C. R. 174; *Bald v. Hagar* (1860), 9 C. P. 382.

Judgment.

OSLER,
J.A.

Appeal allowed.

R. S. C.

CITY OF KINGSTON V. KINGSTON, PORTSMOUTH AND
CATARAQUI ELECTRIC RAILWAY COMPANY.

*Street Railways—Contract—Running Cars—Specific Performance—
Injunction—Mandamus.*

The Court will not order specific performance of an agreement by an electric railway company to run its cars on certain streets at certain hours and with certain officers, as the Court cannot oversee the carrying out of the judgment if granted.

Nor will the Court grant an injunction restraining the company from carrying out such an agreement to the extent to which they are willing to carry it out unless and until they carry it out *in toto*, as this would also involve the same minute supervision.

Nor will the Court direct in an action the issue of a writ of mandamus, where the duty to be fulfilled arises out of an agreement of this kind the performance of which in specie is not deemed enforceable by the Court.

Semble, a prerogative writ of mandamus cannot be granted in an action but only on motion, but even if it can be granted in an action it will not be granted to enforce private rights arising under an agreement.

Judgment of STREET, J., 28 O. R. 399, affirmed, MACLENNAN, J.A., dissenting.

Statement.

THIS was an appeal by the plaintiffs from the judgment of STREET, J., reported 28 O. R. 399.

The defendants had entered into an agreement with the plaintiffs to construct and operate a street railway in the city of Kingston, and the action was brought for a mandamus commanding the defendants to run the cars on certain streets; or for an order for the specific performance of the agreement with respect to these streets; or for an injunction restraining the defendants from operating the railway in part. The facts are stated in the report below. STREET, J., held that a judgment in the terms asked for could not be enforced without the minute supervision which the Court could not give, and therefore dismissed the action.

The appeal was argued before OSLER, MACLENNAN, and MOSS, JJ.A., on the 30th and 31st of March, 1898.

Robinson, Q.C., and *D. M. McIntyre*, for the appellants. This case does not fall within the class of cases in which specific performance of an agreement has been refused

because of the impossibility of exercising the necessary supervision. Here no question can arise as to performance or non-performance; there is nothing left open for opinion or degree; certain things must be done at certain times and in certain ways, and specific performance ought to be adjudged, damages not being an adequate remedy: Fry on Specific Performance, 3rd ed., p. 46; *Township of Wallace v. Great Western R. W. Co.* (1877), 25 Gr. 86; (1878) 3 A. R. 44; *Greene v. West Cheshire R. W. Co.* (1871), L. R. 13 Eq. 44; *Wilson v. Furness R. W. Co.* (1869), L. R. 9 Eq. 28. At any rate an injunction should be granted restraining the defendants from running the railway at all; no supervision would in that case be necessary: *Cohen v. Wilkinson* (1849), 18 L. J. Ch. 378; *Wolverton, etc., R. W. Co. v. London and North Western R. W. Co.* (1873), L. R. 16 Eq. 433. The mandatory jurisdiction of the Court is, however, not fettered by any difficulty as to supervision and a mandamus should be granted commanding the defendants to carry out this agreement, which has been confirmed by statute, and under which public rights have arisen.

Aylesworth, Q.C., and *W. F. Nickle*, for the respondents. There are two answers to the argument that a mandamus should issue; in the first place, the writ issues only on motion and not in an action; and in the second place, it is issued only to enforce a public right, while this is merely a private agreement: *Smith v. Chorley District Council*, [1897] 1 Q. B. 532; *S. C.*, [1897] 1 Q. B. 678; *Benson v. Paull* (1856), 6 E. & B. 273; *Norris v. Irish Land Co.* (1857), 8 E. & B. 512; *In re London, Huron and Bruce R. W. Co.* (1875), 36 U. C. R. 93; *In re Hamilton and North Western R. W. Co.* (1876), 39 U. C. R., at p. 111. Moreover, the same difficulty meets the plaintiffs no matter what form of judgment is granted, namely, the impossibility of having the necessary supervision exercised by the Court, and that difficulty is, under the authorities, fatal. It is important to bear in mind that there is no negative covenant in this agreement: *Ryan v. Mutual Tontine, etc., Association*, [1893] 1 Ch. 116; *Bickford v.*

Argument. *Town of Chatham* (1889), 16 S. C. R. 235; *City of St. Thomas v. Credit Valley R. & W. Co.* (1884), 7 O. R. 332; (1885) 12 A. R. 273; *Wilson v. Northampton and Banbury Junction R. W. Co.* (1874), L. R. 9 Ch. 279. It would be absurd because the defendants fail to perform a small part of their contract to grant an injunction compelling them to violate the rest of it. The whole complaint is trivial, and the plaintiffs can recover damages if any have been sustained. *Robinson*, Q.C., in reply.

November 15th, 1898. Moss, J.A.:—

The appeal is by the plaintiffs from the decision of Street, J., by whom the case was tried. His judgment is reported in 28 O. R. 399, where the facts are fully stated.

The plaintiffs' claim, as presented by the statement of claim at the date of trial, was for an order for a mandamus commanding the defendants forthwith to commence running and to continue thereafter to run on all lawful days the cars of the defendants upon that portion of their railway in the city of Kingston on Princess street from Alfred street westward to the city limits, in conformity with the provisions of the agreement between the plaintiffs and defendants, and particularly pursuant to the provisions of clause 16, sub-clause (c), of said agreement; but subject to the exercise by the defendants of the right reserved to them by clause 16, sub-clause (b), of said agreement. Or, in the alternative, (1) an order for specific performance by the defendants of said agreement with reference to the portion of defendants' railway on Princess street from Alfred street westward to the city limits; (2) an injunction restraining the defendants from ceasing to run their sleighs or cars over said portion of their railway pursuant to said agreement, and particularly pursuant to clause 16, sub-clauses (b) and (c); or (3) an injunction restraining the defendants from operating their said railway, or any part of the same, within the limits of the said city in violation of the provisions of said agreement. Or a declara-

tion of their rights under the said agreement, and particularly under said clause 16, sub-clauses (b) and (c), with reference to (1) whether the defendants are obliged or compellable to run cars or sleighs each day over the whole of the defendants' track within the city, as provided in the said sub-clause, notwithstanding the provisions of clause 20 of said agreement; (2) whether the defendants may during the winter months run cars over a portion of their said railway within the city and sleighs over the other portion of said railway.

Judgment.

Moss,
J.A.

Turning to the agreement between the plaintiffs and defendants, as set out in the schedule to the Act, 56 Vict. ch. 91 (O.), it will be seen that clause 16 deals with the running of the defendants' cars and sleighs along the line of railway which is specified in clause 1. It provides that "the following provisions regulating the running of the said street railway shall be observed by the said company and the same shall refer to the running of sleighs as well as cars as far as the same may be applicable."

Among the regulations to be observed are sub-clauses (a), (b), (c), (f), (g), (h), (i), (j), (k), (o) and (q). The effect of these is to impose upon the defendants the duty of attending to a number of minute particulars and details in connection with the running of the cars or sleighs.

Among other matters to be observed are that the cars are to be properly heated and lighted, and kept clean and comfortable; that they shall commence running at 6 a.m. of each day, and continue running until 10.30 p.m., over the whole track at certain specified intervals; that the ordinary rate of speed is not to exceed fifteen miles an hour; that cars are not to be allowed to stop on a street crossing except under specified circumstances, and when stopped to receive or discharge passengers shall be so located as to leave the rear platform slightly over the street crossing, and when they leave the track or are upset are to be immediately righted and replaced on the track; that there shall be not less than two persons in charge of each car; that there shall be employed careful,

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prudent and sober conductors and motor men to take charge of the cars; that the motor men and conductors shall observe certain precautions to avoid accidents; that the cars after sunset are to be provided with coloured signal lights of a different colour for each route, and a bright head light, and a gong to be sounded under certain circumstances; that on the outside of the cars are to be painted, in large plain letters on a conspicuous place, the number thereof and the name of the route over which they are to be run, and that all snow and ice on the streets used for the running of the cars be kept during such user at such a level as that the general traffic is not interfered with within the agreed upon space.

The case seems to fall within the description given by Lord Justice Knight Bruce to the bill of complaint in *Johnston v. Shrewsbury and Birmingham R. W. Co.* (1853), 3 D. M. & G. 914, at p. 922. It is an action by parties to the agreement against the other parties with two objects—one, to obtain a declaration from the Court of the true construction of the terms of the agreement, and the other, to obtain an injunction to restrain the defendants from breaking the agreement in certain respects. If, therefore, it is not an action for specific performance in form and letter, it is so in substance and spirit. True, there is in addition the claim for a mandamus, but obviously that is made in aid of the claim for performance in specie of the terms of the contract. It is, in substance, an action to compel the performance in specie by the defendants of an agreement amounting to a covenant on their part to do certain acts continuous in their nature and extending over a period of thirty-six years from the present year. These are continuous duties involving personal labour and care of a particular kind; and if the Court should direct their performance in specie it would have to assume their superintendence in order to enforce obedience to its judgment.

The obvious inconvenience, not to say impossibility, of imposing upon the Court any such task is a sufficient reason for holding that this relief should not be accorded.

But it is argued that it is open to the Court to compel the defendants to perform the agreement to run the cars or sleighs over the whole track on all lawful days by means of an injunction prohibiting the defendants from operating their cars or sleighs otherwise than over the whole system, in accordance with the provisions of clause 16, sub-clause (c).

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It is to be observed that the agreement contains no negative covenant with regard to this part of it. And if, as I think, it is an agreement of such a nature that it cannot be specifically enforced, there can be no importing into it of a negative covenant.

I am not aware of any authority which goes the length of doing what is thus sought. It is not to restrain the defendants from doing some particular act the doing of which is a breach or violation of the agreement. This the Court may do and has frequently done in certain cases and under certain special circumstances. But what is sought is an order restraining the defendants from doing something which the agreement requires them to do, and which they are willing to do and are doing, because something else which the agreement calls for is not being done.

The plaintiffs' complaint is that the defendants are omitting or neglecting to do one act which they have agreed to do. It is not the case of their doing or intending to do some positive act which would be a violation of, or a derogation from, their agreement, as in *Lumley v. Wagner* (1852), 1 D. M. & G. 604, and the numerous other cases in which an injunction has been awarded. It is the case of the defendants falling short of performance of the full obligation they undertook. It is not an act done or threatened or intended in direct derogation from the essence of the agreement.

To enjoin the defendants from working or running any part of the system unless the whole is worked or run according to the terms of the agreement seems to me but to intensify the evil complained of. It reduces the relief to the compelling under colour of an injunction of the per-

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formance in specie of every term of the agreement, and therefore an operation of the line with all the resulting circumstances including a complete performance of the detailed duties. And this again involves supervision by the Court in order to see that all the provisions of clause 16 are complied with.

It is also claimed that the plaintiffs are entitled to a mandamus commanding the defendants to operate cars or sleighs upon or along the portion of Princess street in question.

So far as such claim is founded upon the right given by Consolidated Rules 1081-1083 inclusive, it is settled that the Court does not award the writ in an action where the duty to be fulfilled arises out of a covenant or agreement the performance of which in specie is not deemed enforceable by the Court.

As said by Byles, J., in *Fotherby v. Metropolitan R. W. Co.* (1866), L. R. 2 C. P., at p. 195, in speaking of the provision of the Common Law Procedure Act 1854, the language of which is the same as that of Rule 1081: "A claim for a mandamus cannot be added in every action for the breach of a duty, notwithstanding the large words of the 68th section of the Common Law Procedure Act 1854, 'any duty in which he is personally interested,' for it cannot have been intended that specific performance should be enforced of every personal contract."

But the argument is also advanced that the duty is a public duty enforceable by means of the prerogative writ of mandamus and that the plaintiffs are entitled to such a writ in this action.

I am not satisfied that the rules and practice do extend to the award of a prerogative writ of mandamus in an action. I am rather inclined to the opinion that if the remedy of the prerogative writ has to be invoked it should be in the form of a motion.

But I think the plaintiffs have not shewn themselves entitled to such a writ in this action.

The agreement between the parties though ratified by an Act of the Legislature still remains a private contract: see *per* Lord Watson in *Davis v. Taff Vale, etc., R. W. Co.*,

[1895] A. C., at pp. 552, 553. As pointed out by Gwynne, J., in *In re London, Huron and Bruce R. W. Co.* (1875), 36 U. C. R. 93, and *Grand Junction R. W. Co. v. County of Peterborough* (1883), 8 S. C. R. 76, and by Harrison, C.J., in *In re Hamilton and North Western R. W. Co.* (1876), 39 U. C. R., at p. 111, the remedy by the prerogative writ of mandamus is not an appropriate remedy for the enforcement of rights arising out of contract.

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Granting that a public right may arise out of a private contract and be enforceable by means of the prerogative writ of mandamus the public duty is owed to the public and not necessarily to the party to the contract. The latter must for the purpose of obtaining the writ be able to shew that he is directly interested in the fulfilment of the public duty not as a party to the contract but as one of the public.

But in this case any public detriment resulting from the defendants' default is suffered by those of the public who desire to make use of the portion of the line in question and not by the municipal corporation represented by the plaintiffs.

Clause 20 of the agreement indicates that the parties were alive to the difficulties likely to arise in case of the defendants' failure to fully observe at all times and seasons the regulations prescribed by the agreement and provided for themselves the remedy which was probably deemed a reasonable measure of protection to the interests of all concerned.

I think that the appeal fails and should be dismissed with costs.

OSLER, J.A. :—

I agree.

MACLENNAN, J.A. :—

This is an action to restrain the defendants from violating an agreement with the plaintiffs for the operation of their railway. The agreement was made on the 9th of

Judgment. May, 1893, and was validated by Act of the Legislature of Ontario, 56 Vict. ch. 91. The agreement (section 1) defines the streets upon which the defendants were authorized to construct and operate their railway, of which Princess street from Alfred street westward to the city limits is part. By section 16 it is agreed that the following provisions regulating the running of the railway, whether with cars or sleighs, shall be observed: (a) The tracks, etc., shall be kept in repair and safe and efficient; and the cars shall be properly heated and lighted and comfortable; (b) the company shall have the right to substitute sleighs for cars during the winter months; and (c) until otherwise agreed the cars shall run from 6 a.m. until 10.30 p.m. of each day over the whole track. They shall run continuously in both directions with maximum intervals of 15 minutes at any one point, except as to the section on Princess street between Alfred street westward to the city limits on which the time shall be thirty minutes.

By section 19 the road was to be completed and in running order, and the running of cars was to be commenced, by the 1st of January, 1895, except the section on Princess street from Alfred street westward to the city limits which was to be completed by the 1st of January, 1896. The company completed and equipped their railway, and commenced running over the whole line within the time limited by the agreement, and have continued to do so ever since, except with respect to that part of Princess street between Alfred street and the west city limit. On that part of the line they suspended the running during the winter months in 1895 and 1896, and also in 1897. This action was begun in February, 1897, and the defendants admit that they stopped the running on that part of the road during the winter months, and they excuse themselves on the grounds that that part of the line is little used during those months, that few people live along or adjacent thereto, that it is difficult to keep it free from snow and in running order, that it was not expected or contemplated that it would or could be operated during such months, and

that it could not be operated except at a great loss to the company. Now these excuses are clearly no legal justification for the course pursued by the defendants. It is no more than to say that they do not perform their contract just because they choose not to do so. I think in such a case the Court ought to strive if possible to give the plaintiffs some relief, and it is clear that an action, even if brought *de die in diem*, would not do so. Now with great respect I fail to see any insuperable difficulty in the way of an injunction being granted. I do not think it is necessary for the Court to undertake the oversight or management of the details of the company's business in order to compel them to do what they have agreed to do, and which they are now refusing to do. If the company were refusing or neglecting to operate their railway at all, no doubt the Court could not compel them to do so by injunction. But that is not the state of matters. They are operating the railway. They have the cars and sleighs, and the men and the power, and everything is going on regularly, over the whole city and the whole of the streets agreed upon, but they refuse to operate upon part of a street constituting but a small part of the whole street mileage. The people who live upon or near that part of the street, be they few or many, have a right to the service which the contract calls for, and what it was intended to afford to them, as fully and clearly as to other citizens, and they are deliberately deprived of it, merely because the company find it does not pay, and are saying, we will perform that part of our contract which pays, and we will not perform that part which does not pay. The injunction sought is not strictly in the nature of specific performance. The company is performing its contract, but performing it with a difference. I do not see why they should not be restrained from performing it otherwise than according to its terms. It has often been said that the Court will struggle with difficulties in order to compel parties to fulfil agreements of which they have had the benefit. Here the defendants have received and are in the

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enjoyment of the benefits of the contract, an exclusive franchise for their railway over the streets of the plaintiff corporation for a long term of years. I cannot imagine a case which calls more loudly for the assistance of the Court to oblige them to perform their obligations, and I think the law and practice of the Court require that to be done. I think this case is governed by that class of cases in which lands have been acquired for their lines by railway companies and in consideration thereof they have agreed either to construct and maintain roads or other works, or to run their trains in a certain specified manner, for the accommodation and convenience of the land owner. In *Hood v. North Eastern R. W. Co.* (1869), L. R. 8 Eq. 666, the railway company covenanted with Lord Alvanley that a part of the land conveyed to them by him should forever after be used as a first-class station or place for the purpose of taking up and setting down passengers travelling along the said railway. James, then Vice-Chancellor, in answer to the objection that the Court was powerless to enforce that part of the agreement, said (p. 672), he must consider whether he could in that suit give the plaintiff relief or whether he was obliged "to do that which is almost a scandal to our law, drive a man to what used to be called 'the other side of Westminster Hall,' and say 'I will dismiss your bill without prejudice to an action.'" He granted the relief and made a decree declaring that the company had committed a breach of its covenant in not *bonâ fide* using and employing the parcel of ground in the bill mentioned as one for a first-class station or place for the purposes of taking up and setting down passengers travelling along the railway, and restraining them from allowing any of their ordinary or fast trains other than mail, express or special trains, to pass the station without staying there for the purpose of taking and setting down passengers. The case was carried to appeal before Lord Chancellor Hatherley and Giffard, L. J., and the judgment was affirmed, (1870) L. R. 5 Ch. 525, with a variation as to the number of trains which were

ordered to stop. It was argued on behalf of the company that the station was a small one and the number of passengers few, but the Lord Chancellor said, p. 528: "This is a small place, and cannot possibly have any great traffic; and the intention of the parties was, that the company should afford the travellers at that station, few as they might be in number, all the advantages that were given to any other station on the line." There are other similar cases in the books both before and since that decision.

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In *Sanderson v. Cockermouth R. W. Co.* (1849), 11 Beav. 497, Lord Langdale, M. R., decreed the railway company to construct and to maintain such roads, ways, and slips for cattle as might be necessary, and his judgment was affirmed in appeal by Lord Cottenham. In *Lytton v. Great Northern R. W. Co.* (1856), 2 K. & J. 394, Lord Hatherley, then Vice-Chancellor, decreed the construction of a siding with approaches, etc., such as might be convenient and necessary. In *Earl of Lindsey v. Great Northern R. W. Co.* (1853), 10 Ha. 664, Turner, then Vice-Chancellor, restrained the company from permitting any of their trains to pass a certain station without stopping thereat for the accommodation of passengers, and *Rigby v. Great Western R. W. Co.* (1846), 2 Ph. 44, was another case of a covenant to stop trains, and although Lord Cottenham did not grant an injunction, he sent the case to law to try the validity of the covenant, reserving the equity, which, as pointed out in the *Lindsey* case by Turner, V.-C., he would not have done if he had had any doubt of his power to grant it. See also *Raphael v. Thames Valley R. W. Co.* (1867), L. R. 2 Ch. 147, and *Attorney-General v. Mid Kent R. W. Co.* (1867), L. R. 3 Ch. 100, both decisions of the Court of Appeal.

There are many other cases in which the Court has compelled parties to perform their contracts by doing things more difficult of enforcement than what is asked for in the present case.

The removal of buildings is constantly enforced: *Rankin v. Harkisson* (1830), 4 Sim. 13; *Manners v. Johnson* (1875),

Judgment. 1 Ch. D. 673; *Gaskin v. Balls* (1879), 13 Ch. D. 324;
 MACLENNAN, *Smith v. Day* (1880), *ib.* 651; *Daniel v. Ferguson*, [1891]
 J.A. 2 Ch. 27; and *Smith v. Smith* (1875), L. R. 20 Eq. 500;
 in which observations by Jessel, M. R., on the history of
 the mandatory injunction are to be found. Cases of
 works ordered to be performed are the following: *Lane*
v. Newdigate (1804), 10 Ves. 192, in which Lord Eldon
 restrained the defendant from keeping the banks of a
 canal and lock out of repair; *Storer v. Great Western*
R. W. Co. (1842), 2 Y. & C. C. C. 48, in which Knight
 Bruce, then Vice-Chancellor, enforced a contract for the
 making of a road by ordering it to be done and forever
 maintained.

De Mattos v. Gibson (1859), 4 DeG. & J. 276, was the
 case of a charter of a ship to carry coals to Suez from the
 Tyne, and although an injunction was refused owing to
 special circumstances Chelmsford, L. C., at p. 299, said :
 "I think that a vessel engaged under a charter party
 ought to be regarded as a chattel of a peculiar value to the
 charterer, and that although a Court of Equity cannot
 compel a specific performance of the contract which it
 contains, yet that it will restrain the employment of the
 vessel in a different manner, whether such employment is
 expressly or impliedly forbidden, according to the principle
 so fully expressed in *Lumley v. Wagner*. In such cases
 the Court repudiates the idea of indirectly compelling per-
 formance where it could not directly decree it. It gives
 all the relief in its power, without looking to the effect
 which may be ultimately produced by the restraint which
 it places on the party who is disposed to break his con-
 tract." *Le Blanch v. Granger* (1866), 35 Beav. 187, was
 also the case of a charter of a ship, and Lord Romilly
 used this language : "I have no doubt * * that where
 there is no question about the charter party, though this
 Court cannot decree the specific performance of it, yet
 it can restrain the employment of a ship in a manner
 inconsistent with the rights given by the contract." Now
 here there is no question of the contract, the defendants

have their track and rails and cars and sleighs fully equipped and in running order, and not only so, but actually running and in operation, but they run them in a manner inconsistent with the rights given by the contract. *Strelley v. Pearson* (1880), 15 Ch. D. 113, was the case of a covenant in a lease to work mines, and Fry, J., while refusing to grant an interim injunction against the lessee to restrain him from ceasing to pump water out of the mine, had no doubt it was proper to do so. *Cooke v. Chilcott* (1876), 3 Ch. D. 694, was the case of a sale of land with a covenant by the vendee to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's adjoining land. An injunction was granted by Malins, V.-C., restraining the defendant from allowing the work to remain unperformed and the decree was affirmed in appeal. And *Fortescue v. Lostwithiel and Fowey R. W. Co.*, [1894] 3 Ch. 621, was the case of a covenant for the construction of certain roads and fences with a wharf and crossings and to carry certain poles and faggots of the plaintiffs, and to maintain the works, and Kekewich, J., ordered the covenant to be performed, although feeling considerable difficulty about that part of it relating to the poles and faggots. In a note to that case is a report of a decision of Sterling, J., in *Earl of Jersey v. Great Western R. W. Co.*, [1894] 3 Ch. 625 (n.), affirmed in appeal, in which the defendants were decreed to make and forever maintain a public road fifty feet wide between certain points. Now, in all these cases there was as much, and in some much more, difficulty in enforcing performance as in the present case. It is said that the performance of the required service involves the lighting and heating of the cars, the employment of servants to do the work, and that the various services are numerous, minute, and various. But all that is equally true in the cases to which I have referred, in a greater or less degree. Take the cases of the removal of buildings: workmen and labourers must be employed under directions to be given to them by the party enjoined. In the case of companies each thing

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must be done by persons employed to do it, and employed from time to time as occasion requires. In the cases relating to the stopping of trains, the switches have to be adjusted, the signals to be attended to, and the bell or the whistle to be sounded. The engineer must shut off the steam and the brakeman apply his brakes; in order to comply with the injunction of the Court, by the stopping of the train, all the plant and machinery and staff of the company have to be specially directed and applied to that end, and even the running of other trains must be managed in such a way as to comply with what is ordered. There is nothing more required in the present case, and I should say there is much less. The running of street cars is a much simpler business than the running of trains on a great railway, and it is obvious that it is the simplest thing in the world for the defendants to do what is required of them while their cars are being operated on the other streets of the city.

They have been heretofore operating their cars upon this part of the street in the summer months, and they say they intend to do so in future, therefore it is impossible for them to say that there is any difficulty in doing so in winter, that being so I do not think the Court can refuse relief to the plaintiffs because there is difficulty in compelling performance. The case of *Ryan v. Mutual Tontine, etc., Association*, [1893] 1 Ch. 116, was relied on by the company. But I do not think it has any application to this case. That was the case of a lease, and a contract by the landlord to employ a porter who should perform certain daily services for the tenant during the term; and it was held that specific performance could not be decreed. The judgment was rested on two grounds, as I understand the case, first, because there being no contract between the plaintiff and the porter, the Court could not compel the services to be performed, and secondly because if it could it would require daily superintendence by the Court. I think the case makes nothing against the present plaintiffs but is rather in their favour. There Kay, L. J., points out

that where, as in this case, a company has obtained land, Judgment.
on condition of carrying out works, specific performance of MACLENNAN,
definite works will be decreed. J.A.

Upon the whole I think this case fulfils the conditions stated by Fry, L. J., in his work on Specific Performance, 3rd ed., p. 46. These conditions according to the learned author are three: first, that the work to be done is defined; secondly, that the plaintiff has a material interest in its execution which cannot be adequately compensated by damages, and thirdly, that the defendants have by the contract obtained from the plaintiff possession of the land on which the work is to be done.

In my opinion, therefore, it should be declared that the defendants have committed a breach of their contract to run cars or sleighs from Alfred street along Princess street westward to the city limits, and that they be restrained from discontinuing the running of cars or sleighs from Alfred street along Princess street westward to the city limits during the winter months or at any time hereafter in accordance with and during the continuance of the agreement.

Appeal dismissed, MACLENNAN, J.A., dissenting.

R. S. C.

COUNTY OF SIMCOE V. BURTON.

Principal and Surety—Bond—Municipal Treasurer—Audit—Representations.

The treasurer of a county for a number of years embezzled county funds and by manipulation of his books deceived the county auditors who from year to year reported in good faith that his accounts were correct, and the council in good faith adopted the reports. While in fact in default to a large amount, the defendant, who was a ratepayer resident in the county and a relative of the treasurer, became at his request one of his sureties, and at the time was told in good faith by a member of the council and some of the county officials that the treasurer's accounts were correct :—

Held, that the auditors' reports so adopted by the council were not implied representations by the council, the incorrectness of which discharged the defendant.

Held, also, that the statements made by the member of the council and the county officials did not bind the council, and that even if they did, having been made in good faith, they formed no defence.

Judgment of ARMOUR, C.J., reversed.

Statement. THIS was an appeal by the plaintiffs from the judgment of ARMOUR, C.J.

The action was brought against the defendant asking payment of \$5,000 by him as surety upon a bond in favour of the plaintiffs for the due accounting to them by their treasurer, one S. J. Sanford. Sanford was appointed treasurer of the county in 1885, and continued to act as treasurer till June, 1897, when he absconded, being, as was found upon his accounts being then investigated, a defaulter, to the extent of more than \$60,000. From the time of his appointment auditors were, as required by the Municipal Act, appointed from year to year, and from year to year they reported that the treasurer's accounts were correct, and from year to year these reports were adopted by the council. The bond in question was given on the 1st of August, 1893, and the treasurer was then, as was afterwards found, a defaulter to the extent of more than \$20,000. The defendant was a ratepayer living at the county town and was a relative of the treasurer, and became a surety at his request. At the same time Sanford gave further security to the plaintiffs in the sum of \$10,000 by the bond of a guarantee company, to whom the

warden of the county gave a certificate stating that the treasurer's accounts when last examined were correct in every respect. Statement.

The defences mainly relied on were that the audits and their adoption were an implied representation to the defendant of the correctness of the accounts; that the warden's certificate given to his co-surety might be relied on by him; that the bond of the guarantee company was to have been co-extensive in its terms with that given by the defendant and was not; and that representations as to the treasurer's position made to the defendant by some members of the council and some of their officials bound the council and relieved him.

The action was tried at Barrie, on the 28th and 29th of October, 1897, before ARMOUR, C.J., who, on the 11th of November, 1897, gave the following judgment in the defendant's favour:—

Sanford was appointed treasurer of the county of Simcoe on the 30th of November, 1885, and continued to be such treasurer until on or about the 16th of June, 1897, when he absconded, a defaulter to the plaintiff corporation for the sum of \$62,857.02.

He commenced to embezzle the money of the plaintiff corporation the very day after his appointment, and continued to embezzle it from day to day, until, at the date of the bond sued on in this action, he had become a defaulter to the extent of about \$25,000.

From the date of his appointment to the date of the bond, the council of the plaintiff corporation had every year appointed auditors, as required by law, and these auditors had always reported the correctness of the treasurer's accounts, and their reports had always been adopted by the council.

The defendant, at the time he signed the bond sued on, had a right to assume that the auditors had done their duty, and that the council had done its duty, and that the

Judgment. audits so made and adopted truly shewed the correctness
of the treasurer's accounts.

ARMOUR,
C.J.

These audits, and their adoption by the council, were in effect representations by the council to the ratepayers of the county (of whom the defendant was one) that the treasurer was not, at the time they were made, in default.

These representations the defendant had a right to rely upon, as he did, and as, apparently, everyone else did. He also relied upon the assurances given to him by the chairman of the finance committee of the council, and contained in the certificate of the warden to the guarantee company, impliedly assuring him that the treasurer was not then in default. These representations having turned out to be in fact untrue I must hold that the defendant is discharged from liability upon his bond.

And there is no hardship upon the plaintiff corporation in so holding, for if their council had done its duty and had appointed competent and efficient auditors, and had itself, upon their report, properly and efficiently finally audited and allowed the accounts of the treasurer, as it was required to do by law, the default by the treasurer would have been discovered at the very first audit.

There is another ground upon which, in my opinion, the defendant is entitled to be discharged from liability upon his bond. He was entitled to assume, from the report of the finance committee of June 16, 1893, in pursuance of which his bond was given, that the liability of the guarantee company upon its bond would be co-extensive with his liability upon his bond, and the answer of Mr. Pepler to his enquiry why the guarantee company was not a party to the bond which he was asked to sign, that the guarantee company had a form of bond of its own, would not tend to rebut that assumption, nor would it give him to understand that the liability of the company on its own bond would be less extensive than his liability upon his bond, and the effect of what was done was to prejudice his right to contribution.

The action must, therefore, be dismissed with costs.

The plaintiffs appealed and the appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 1st and 4th of April, 1898. Argument.

Osler, Q.C., and *J. A. McCarthy*, for the appellants. The appellants had no knowledge of the treasurer's defaults, but even if they had known of them they were not bound to tell the defendant: *Niagara District Fruit Growers' Stock Co. v. Walker* (1896), 26 S. C. R. 629. The audits and their adoption were not representations to the defendant the incorrectness of which discharges him. At most there was negligence, but that is not enough unless specially contracted against: *Harbour Commissioners of Montreal v. Guarantee Company of North America* (1893), 22 S. C. R. 542; *Springer v. Exchange Bank of Canada* (1887), 14 S. C. R. 716. And there was no continuance of employment after knowledge of the default, as in *Township of Adjala v. McElroy* (1885), 9 O. R. 580. The case is within *Township of East Zorra v. Douglas* (1870), 17 Gr. 462, and *Peers v. County of Oxford* (1870), 17 Gr. 472.

Aylesworth, Q.C., and *W. A. Boys*, for the respondent. The untrue representations of the council and its officials have prevented any liability attaching under the bond: *Village of Gananoque v. Stunden* (1882), 1 O. R. 1; *Blest v. Brown* (1862), 3 Giff. 450; *Molsons Bank v. Turley* (1885), 8 O. R. 293; *Merchants Bank v. McKay* (1886), 12 O. R. 498; *Port Elgin Public School Board v. Eby* (1894), 26 O. R. 73.

Osler, Q.C., in reply.

October 4th, 1898. BURTON, C. J. O. :—

This was an action brought by the corporation of the county of Simcoe upon a bond given by the defendant as one of the sureties of the treasurer of the county, in pursuance of the requirements of the Municipal Act.

The treasurer was appointed to the office on the 30th of November, 1885, and remained in office until the 16th of

Judgment. June, 1897, when he absconded, being at that time a defaulter to the corporation to the extent of over \$60,000.
BURTON,
C.J.O.

He had previously to June, 1893, had other sureties, but some of them having left or having desired to be relieved, the present defendant was applied to by the treasurer to become his surety to the extent of \$5,000, and signed the bond in question.

If gross negligence and the utter disregard of the duties of their office by the members of the council and by the auditors appointed by them, during the whole time that the treasurer filled the office of treasurer, could be any answer to the defendant's liability on the bond, then his defence would be made out, for more culpable negligence and incompetence on the part of both could scarcely be displayed anywhere, the result being that at the time the defendant executed the bond in question the treasurer was a defaulter to the extent of some \$20,000 or \$25,000.

The learned Chief Justice in his judgment below proceeded upon the ground that the defendant when he signed this bond had a right to assume that the auditors had honestly and intelligently performed their duties and that their audits had been duly and properly investigated and passed upon by the council, and were in effect representations by the council to the defendant and the public generally that the treasurer's accounts were correct and that he was not in default.

Upon the question of negligence, I think the authorities are all one way. In an American case, *Tapley v. Martin* (1874), 116 Mass. 275, an action on an indemnity bond given to a person who had become surety for a bank clerk, it was held that negligence, however gross, on the part of the bank officers without knowledge of the frauds perpetrated would not discharge the sureties, and this was affirmed in the appellate court with the remark that we can see no principle upon which it can be held to have this effect. The object of the bond is to guarantee to the bank the faithful performance by the cashier of his duties. His duties and obligations are not affected by the negligence

of other officers or agents of the bank, and such negligence does not discharge the sureties.

Judgment.

BURTON,
C.J.O.

It is true that the Municipal Act requires the council to appoint auditors to provide for periodical examinations of the treasurer's accounts, but even the omission to make such appointment would not operate to discharge the surety unless the making of such examination was made a condition by agreement with the sureties.

The statute and the bond have the very same object in view, a double security against the defalcations of the treasurer. The failure by the auditors or the members of the council to fulfil their duties can be no reason why the corporation should lose the other security also. The negligence of one officer of the council to perform his duty, and by his carelessness enabling another officer to commit a fraud, can be no reason why the surety of that fraudulent official should be discharged.

In this case there is no pretence that the council were aware that the treasurer was a defaulter. They ought to have known it, no doubt, but that is only imputable to them as negligence, and no efforts were used by them to induce the surety to enter into the obligation without a request made by him to the council as a body to give him information as to the state of the treasurer's accounts. It does not appear to me in the absence of any reason to suspect the official that there was any duty to make any examination, certainly not if not requested to do so with a view to entering into the engagement.

But the learned Chief Justice thinks that the council, by adopting the statement of the auditors, made it a representation upon which the surety was justified in acting. If the council had been applied to with the knowledge of the purpose for which the information was sought and this report had been sent, I should have been inclined to agree with him, but I think any thing short of this would be insufficient. The report was not intended for any such purpose. The only case which I have found at all like this is *Graves v. Lebanon National Bank* (1873), 10 W. P. D. Bush (Kentucky) 23.

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C.J.O.

There a bank cashier had embezzled the bank's funds, the discovery of which, though not made, might have been easily made by the use of slight diligence on the part of the directors.

They, however, published in accordance with the law a statement of the condition of the bank, from which it appeared that its affairs were being prudently and honestly administered, and from which the public had a right to believe the cashier was trustworthy. The surety, subsequently having seen this report, executed a bond as surety for him. Without expressing any opinion as to whether the statutory reports so published could be treated as representations to the public, it is sufficient to say that the sureties there had read the reports, or one of them, and acted upon it.

I do not think that the statement made to the council by the auditors and adopted by them can be regarded as a representation made to this defendant, but there are many other reasons why I fear we cannot adopt that defence. No such defence is pleaded and there is no evidence that it came to the knowledge of the defendant, or influenced him in executing the bond.

I am unable to find any evidence that it was agreed that the guarantee bond should be co-extensive with the obligation of the defendant. If there was any such understanding on his part, it was incumbent upon him to see that the guarantee was in that form before completing the transaction.

It is a very hard case upon the defendant, but I cannot say that he is altogether free from blame in not taking more pains to obtain reliable information as to the actual state of the treasurer's accounts; and, much as I regret it, I think we must hold that no representations were made or intended to be made to him to induce him to enter into this bond. I gathered from the statement of counsel that if judgment was adverse to the defendant a reference would not be necessary. The appeal, therefore, must be allowed.

OSLER, J. A. :—

Judgment.

OSLER,
J. A.

Some of the grounds on which the judgment at the trial was rested I am, with all respect, unable to concur in. Such, for example, are those which depend upon the negligence of the plaintiffs in their own dealings with their treasurer: the effect attributed to the alleged assurance of the chairman of the finance committee of the county council, having regard to the circumstances under which it was given, that the treasurer was not then in default; or, again, the yearly published audits of the accounts by the county auditors. These not having been put forward by the plaintiffs to the defendant as express representations for the purpose of being acted upon, I cannot regard as representations the untruth of which can now be shewn for the purpose of defeating the defendant's obligation. The same observation applies to the certificate given by the warden to the agents of the guarantee company. It was not given to the defendant, or given for the purpose of being shewn to or acted upon by him. It does not seem to have been actually seen, or heard read by him. It is, moreover, non-committal in its terms, and states apparently nothing but what was strictly true, so far as it affirms anything.

There was negligence on the part of the plaintiffs and their auditors in dealing with their treasurer's accounts, negligence which it would not be easy to describe with due moderation of expression, but this is not enough to absolve the surety. There was no fraudulent concealment of facts which ought to have been communicated to him when he was about to become surety, and herein consists the notable weakness of the defendant's case. Sanford had in fact deceived every one into a mistaken belief in his honesty, and that was really what the defendant was resting upon.

On the questions of concealment and negligence, I refer to *Township of East Zorra v. Douglas* (1870), 17 Gr. 462; *Niagara District Fruit Growers' Stock Co. v. Walker*

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(1896), 26 S. C. R. 629; *Wayne v. Commercial National Bank* (1866), 52 Pa. St. 343, 349, 350; *Tapley v. Martin* (1874), 116 Mass. 275; *Smith v. Bank of Scotland* (1813), 1 Dow 272; Am. & Eng. Ency., vol. XXIV., p. 793, *et seq.*

A further ground relied upon at the trial and upon the appeal, viz., that the security taken from the guarantee company is not co-extensive with that taken from the defendant, also, I think, fails, although I at one time was disposed to adopt it and to treat the defendants as being bound by what their solicitor had stated to the defendant as to the effect or extent of that security. But further reflection has convinced me that the stipulations contained in the defendant's own contract preclude him from relying upon this defence. There was no attempt to prove, and probably it would have been difficult to prove, that the defendant was misled into signing his contract by any misrepresentation of its contents, in short, that any fraud was practised upon him, and in the face of his own declarations therein less than that will not do. He in effect says to the plaintiffs that they may contract on any terms they will as to the other sureties, or even take no other surety at all. I must hold, and I may be allowed to add, with regret, that the appeal should be allowed.

MACLENNAN, J. A. :—

It was admitted that when the bond in question was given on the 1st of August, 1893, the treasurer was a defaulter to the amount of over \$20,000, and that his defaults continued to increase from that time until he absconded about the 16th of June, 1897, when they amounted to \$62,000. The judgment holding that the defendant is not bound is rested upon the ground of representations, for which the plaintiffs are responsible, made to the defendant, that at the date of the bond the treasurer was not in default; and a further representation that the liability of a guarantee company for the integrity of the treasurer was, or was to be, co-exten-

sive with the bond given by the defendant, which was untrue. The representations relied on were the following: Sanford had been treasurer for many years, and was reputed to be honest and possessed of considerable property. The defendant was well acquainted with him, and had been associated with him in business, and firmly believed in his honesty. There was also a family relationship between them, and it was at Sanford's request that the defendant became his surety. The treasurer's accounts had been audited every year by auditors duly appointed, and they had never reported anything amiss, and the last audit prior to the date of the bond had been up to the 30th of April, 1893. This report of the auditors had been considered by a finance committee of the council; and the chairman, Dr. McAllister, had by a report dated the 17th of June, certified that they had examined the auditors' statement carefully, and were gratified to find the finances in a satisfactory condition, shewing a balance on hand on December 31st, 1892, of \$23,876.23, and recommended that the auditors' report with abstract and detailed statement of receipts and expenditures should be printed in the minutes of the June session. This report of the finance committee was adopted by the council. The treasurer's accounts were in fact false, and instead of a balance of \$23,876 on hand, there should have been a larger sum by upwards of \$20,000. It is not suggested that the auditors acted dishonestly, nor but that they and the chairman of finance, and the council generally, believed that the accounts were honest and true.

The learned Chief Justice, however, holds that by the adoption by the council of the auditors' and finance committee's reports, the corporation in effect represented to the ratepayers generally, of whom the defendant was one, that the treasurer's accounts were correct, and that he was not in default. He says that the defendant had a right to rely upon that representation, as he did, and as apparently everyone else did, and that, being untrue, he was discharged from liability on his bond.

Judgment.

MACLENNAN,
J.A.

Judgment.

MACLENNAN,
J.A.

The defendant also in his evidence says that after he had been requested by Sanford to become his surety he made various enquiries. He met McAllister casually and told him of Sanford's request, and asked him if it was all right, referring to the treasurer's books and transactions, to which McAllister answered that everything was all right. He also speaks of a conversation with Mr. Pepler, the county solicitor, in which that gentleman expressed the opinion that there was little risk, and that the suretyship was a matter of form. He also testifies that he had talked with Mr. Lett, agent of a guarantee company, with whom an application was pending for a guarantee for the treasurer to the amount of \$10,000, and who told him the substance of a certificate received by the company from the warden in support of the application. That certificate is dated the 7th of July, 1893, and is to the effect that to the best of the warden's knowledge, the treasurer had performed his duties honestly, faithfully and diligently, that when last examined his accounts were found in every respect correct, and that he knew of no reason why the guarantee applied for should not be granted.

There are other representations relied on by the defendant, and with reference to them the learned Judge says that having turned out to be untrue the effect of them was to discharge the defendant.

Now, with great respect, I am of opinion that the learned Judge has come to a wrong conclusion upon the law bearing on the matter, and that the authorities do not warrant us in upholding his judgment. The treasurer had so manipulated his accounts that for a number of years, and from year to year, he had deceived the auditors and the council; and while he was in fact a defaulter to a large sum the council and auditors, and, as the learned Chief Justice says, apparently every one else, believed that his accounts were correct. The auditors were careless, but there is no suggestion that they were dishonest; and their reports, and also the report of the finance committee, and the warden's certificate, were all made honestly, and in good

faith. The same thing is to be said of the statements made to the defendant by McAllister. Now the county had not requested the defendant to become a surety. They had required the treasurer to give security to the amount of \$30,000, and the treasurer proposed to give a mortgage on his own property for \$10,000, a guarantee company's bond for \$10,000 more, and the bond of two friends for \$5,000 each, of whom the defendant was one. The council agreed to accept the security offered, Mr. Pepler was to prepare the instruments, or to see that they were all in proper legal form; but neither Dr. McAllister nor Mr. Pepler had any authority to bind the plaintiffs by any statement or representation as to the treasurer's integrity or as to the correctness of the accounts. If the defendant had desired to bind the council by any statement or representation he should have obtained some formal corporate act, which would have that effect, but he did not do so; and I do not think the corporation is bound by anything that was said by either Dr. McAllister or Mr. Pepler, or by the warden's certificate, even if the defendant was misled by them. There was, therefore, no fraud in the case, nor was there any actual representation of any kind, for which the corporation was responsible. In *Township of East Zorra v. Douglas* (1870), 17 Gr. 462, it was held, as the result of the authorities, that a surety cannot get rid of his liability on the ground of want of information, unless he can shew that it was fraudulently withheld; and in *Peers v. County of Oxford* (1870), *ib.* 472, it was held that, to relieve him from his obligation, concealment of material facts must be fraudulent; and in *Niagara District Fruit Growers' Stock Co. v. Walker* (1896), 26 S. C. R. 629, there had been a succession of defaults by the principal in the business, and in the very matters which were the subject of the guarantee, which were not communicated to the surety, but it was held that the non-communication of them, although known to the creditor, did not relieve the surety. And in *De Colyar on Guarantees*, 3rd ed., p. 369, where all the cases are collected and discussed, the author states

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J.A.

Judgment. the law to be that no concealment will vitiate a guarantee unless it be fraudulent, and, at p. 370, that the omission to disclose things which the principal is bound spontaneously to disclose, must be wilful and intentional in order to relieve the surety. I think those propositions are established by the authorities which he cites.

MACLENNAN,
J.A.

The learned Chief Justice also rests his judgment on another ground, namely, that the bond taken from the guarantee company was not co-extensive with that taken from the defendant, as he had a right to assume from the report of the finance committee of the 16th of June, 1893, whereby his right to contribution from that company was prejudiced. I think that ground also insufficient to sustain the judgment. I think the objection is conclusively answered by the terms of the defendant's bond. It recites that the agreement was that he and his co-obligor Rogers had agreed to give their bond wholly independently of one another, and independently of the other securities referred to, one of which was the guarantee company's bond, and this is repeated in a subsequent part of the bond where it is agreed between the obligors and obligees that the liability of the former is not in any way to depend on the giving of the said other securities. Therefore, the defendant would, in my opinion, have been liable even if the guarantee company had given no bond at all. Nor do I think that conclusion negated by the proviso that any rights of contribution between the different sureties themselves should not be affected.

I am, therefore, of opinion that the appeal should be allowed, and that the plaintiffs should have judgment for the amount of the bond.

MOSS, J. A. :—

The questions involved in this appeal turn chiefly upon the effect to be given to the conduct of the plaintiff corporation and its officers in reference to one S. J. Sanford and his accounts as treasurer of the county, and there is very little dispute as to the facts.

After a careful examination and consideration of the evidence I find myself unable to concur in the judgment appealed from.

Judgment.

Moss,
J.A.

I have not been able to convince myself that the rights of the corporation are at all affected by the statements made by McAllister, the chairman of the finance committee of the council, to the defendant in the conversation had with him in the month of June, 1893, or by the information with reference to the warden's certificate afterwards conveyed by Lett to the defendant.

I do not say that the somewhat lax rules which are sometimes found applied to trading or private corporations and their managers should be applied to a public corporation and its managers, but it is doing no injustice to the defendant to apply to this municipal corporation the same principles as are applied to an ordinary private corporation, and to treat the members of the council as on no higher plane than directors of an incorporated company.

It is settled that a company will be bound by false and fraudulent statements contained in reports made to it by the directors, if they have been adopted by the corporation and designedly published and put into circulation through the act of the corporation, and have thus come to the notice of third persons who it was intended should act upon them and who did act upon them to their injury.

It was not without considerable discussion and diversity of opinion that the conclusion was finally arrived at, that a company was bound by false and fraudulent statements in directors' reports, but it may now be taken as settled law that after adoption a report is the act of the company and not simply of the directors, and that, if after adoption it is circulated, misstatements contained in it must be taken to have been made with the authority of the company, and it is disabled from enforcing contracts or agreements with it induced by such conduct on its part.

The elaborate arguments and judgments in *Nicol's Case* (1859), 3 DeG. & J. 387, the opinion of the Judicial Committee in *MacKay v. Commercial Bank of New*

Judgment. *Brunswick* (1874), L. R. 5 P. C. 394, and the speeches of Moss, J.A. the Law Lords in *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317, fully illustrate this branch of law and the varying views taken.

It is also settled that a company is bound by the representations and admissions of its directors and other agents made while they are acting within their authority and in a due course of business. But in the case of directors, the representation or admission to be binding on the company must be by the whole of them or a quorum thereof as a body, or otherwise acting in accordance with the regulations of the company so as to bind it.

Now, giving the defendant the full benefit of these principles, they do not aid him.

McAllister had no authority as an individual member of the council and was not authorized by any act of the corporation to make, in the course of a casual conversation held away from the council chamber and not while the council was actually sitting, any statement on its behalf with reference to the matter of Sanford's dealings as treasurer. And even assuming an enquiry addressed to him in a much more formal manner and answered more definitely and pointedly, his answer could not bind the corporation.

The certificate given to the guarantee company by the warden was not intended to be seen or acted upon by the defendant, and in fact it was not seen by him. The information as to its contents came from Lett, who was in no sense the agent of the corporation for the purpose of making any communication on its behalf to the defendant.

And neither the certificate nor the reports made from time to time upon the financial affairs of the corporation and the treasurer's security can be said to have been falsely or fraudulently concocted and circulated with the intention of their being acted upon by the defendant in the matter of his becoming surety for the treasurer, or with the intention of deceiving or misleading any one.

This does not impugn in the least the principle that a

corporation cannot retain an advantage secured by the fraud or misrepresentation of its agents.

As regards the defendant's action in accepting the position of surety, the statements of McAllister, the certificate of the warden and the reports of the finance committee communicated to the defendant under the circumstances disclosed in the evidence, can no more affect the position or rights of the corporation than if they were made by complete strangers.

They were not communicated to him by or under the authority of the corporation in answer to enquiries for information addressed by him to it.

It is further put forward on behalf of the defendant that the corporation, by accepting the bond that it took from the guarantee company, has either deprived the defendant of his right of contribution or limited its extent, and that this is contrary to the terms and understanding upon which the defendant agreed to become surety, and he is, therefore, not liable.

In support of this contention he relies upon the report of the finance committee of the 16th of June, 1893, the bond or instrument executed by him upon which this action is brought, and the statements made by Mr. Pepler, the corporation solicitor, before and at the time of the execution of the bond.

The language of the bond has a very material bearing on this question. It recites that Sanford is the treasurer of the corporation and that it has requested him to furnish security for the faithful performance of the duties of the office in the sum of \$30,000, which he has agreed to do, part by a mortgage and pledge of his own property and part by or through a guarantee company, and part as therein contained, and that the defendant has consented and agreed to give and join in the bond or obligation as surety for Sanford in the sum of \$5,000, wholly independent of his co-surety in the bond and independently of the other securities above referred to.

Amongst other undertakings contained in the bond or

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instrument, there is one to the effect that the defendant shall be liable to the extent of \$5,000 wholly independent of the other surety or of the other securities thereinbefore referred to, and that his liability is not in any way to depend upon the giving, varying, relieving, releasing or otherwise dealing or omitting to deal with the other surety or the other securities, and that his liability shall not be affected in any way by the action or want of action on the part of the corporation as to the other surety or the other securities.

This is followed by a proviso that the foregoing provision is not to affect in any way the rights of contribution or otherwise as between the different sureties themselves.

Then there follows further on a declaration of intention that the defendant shall be bound as a principal to the extent above mentioned for any default of Sanford.

I find the language of the bond too strong to enable me to say that the defendant is entitled to be relieved on this ground.

He did not rely upon the report of the finance committee of the 16th June, 1893, for he states that he cannot say that he saw it, or any copy of it. He had of course a right to rely upon the recital in the bond which substantially sets forth the statement of the report with regard to the guarantee company, and to accept Mr. Pepler's statements as made.

But he was also bound to take notice that by the same instrument he agreed that his liability was to exist even though there was no giving of the other securities, or that having been given they were afterwards varied or the benefit of them relinquished.

And further, that it was the intention that he should be bound as a principal to the extent of \$5,000.

Therefore, while it must be conceded that the defendant was entitled to suppose, as well from Mr. Pepler's statements as from the recital and other contents of the bond, that the security then proposed to be taken from the guarantee company would assure him of contribution in

case the loss did not reach the aggregate of their respective liabilities, it must also be conceded that he agreed that the corporation was to be at liberty to refrain from taking the security or to take a different one, or to vary or release it.

Judgment.

Moss,
J.A.

To relieve himself from this position, it was incumbent on the defendant to allege and shew that it was part of the agreement and understanding, on the faith of which he became surety and executed the bond, that notwithstanding the agreements therein contained there was to be at all times and under all circumstances a co-extensive liability by the guarantee company and a right of contribution against it; and further, that he did not understand the meaning of the bond when he signed it and was led to sign it without being aware of the covenants and agreements it contains.

In other words, that a fraud was practised upon him in procuring him to execute the bond in its present form.

This has not been alleged or proved, and I apprehend it was not capable of proof. Neither the allegations nor the evidence reach the point of shewing that either before or at the time of signing the bond the defendant stipulated as a condition of his executing it that the guarantee company's liability was always to be co-extensive with his, or such as to entitle him to contribution, unless the amount of defalcations absorbed the aggregate liability: see *Traill v. Gibbons* (1861), 2 F. & F. 358; *Ansten v. Howard* (1816), 7 Taunt. 28.

The presumption of law noticed by Sir George Jessel, M. R., in *In re Cooper, Cooper v. Vesey* (1882), 20 Ch. D., at p. 629, that when a man signs a deed he is acquainted with its contents and understands its effect, has not been rebutted or attempted to be rebutted.

The alleged negligences of the corporation in not taking more care to see that the treasurer's accounts were duly and properly kept, and of the corporation auditors in not properly and efficiently performing their duties, do not, I think, constitute an answer to the claim.

Judgment.

Moss,
J.A.

There is no ground for assuming fraud on the part of any one except the treasurer himself, or any connivance with him, or anything worse than a most reprehensible carelessness and want of proper business methods in looking after and scrutinizing the financial dealings of the treasurer, which, it is to be regretted, are only too frequently to be found manifested in corporation management.

The argument that the corporation is responsible for the neglect or inefficiency of its officers in their conduct of its affairs, and that the negligence and inefficiency on the part of the members of the council and the auditors shewn in this case should discharge the defendant, is, I think, answered by a reference to the provisions of the Municipal Act.

Every treasurer is bound to give and every municipal council is bound to take security for the faithful performance by the treasurer of his duties. It is the policy of the law that every municipal corporation should be secure in respect of the corporation funds.

The provisions of the Act with reference to the appointment of, and the duties to be performed by, auditors, as well as those with reference to the reports to be made upon the treasurer's accounts and securities appear to have for their immediate object the further security of the municipal funds by enabling the council through and by means of the auditors and otherwise to investigate the state of the treasurer's accounts and to ascertain whether his receipts and payments and all his dealings with the corporation finances and securities have been properly entered and accounted for.

It would, I think, be contrary to the object and design of these provisions to hold that failure on the part of the persons appointed, to properly perform these duties puts an end to the additional security which the Act imperatively requires to be taken: *Mayor of Durham v. Fowler* (1889), 22 Q. B. D. 394; *Mayor of Kingston-upon-Hull v. Harding*, [1892] 2 Q. B. 494; *Byrne v. Muzio* (1881), 8 L. R. Ir. 396.

It was further contended that a portion of the amount of the treasurer's defaults since the date of the bond sued on was not corporation funds come to his hands as treasurer or during the course of the performance of his duties as such, and that to the extent of such portion the defendant is not liable.

Judgment.

Moss,
J.A.

But upon the figures I am satisfied that after making every allowance which the defendant is fairly entitled to claim, there remains more than \$5,000. And upon the terms of the bond the defendant is liable to pay \$5,000 to the corporation independently of the other securities.

I do not wish to express any opinion not necessary for the disposition of the questions arising on the present record, but I may observe that the matter of contribution cannot arise as a practical question until it is made to appear that \$5,000 is more than the defendant's proportion of the defalcation for which he is liable.

Appeal allowed.

R. S. C.

TOWNSHIP OF LOGAN V. TOWNSHIP OF MCKILLOP.

Ditches and Watercourses Act—57 Vict. ch. 55 (O.)—Owner—Appeal from Award—Trustees—Service of Notices—Deepening Ditch—Water and Watercourses.

Per OSLER and MOSS, JJ.A., BURTON, C.J.O., contra.—Where in proceedings under the Ditches and Watercourses Act, 57 Vict. ch. 55 (O.), a declaration of ownership has been made and filed by the person initiating the proceedings, any objection to his status as owner should be made before confirmation of the award; the effect of section 24 being that the award when made and confirmed by lapse of time or on appeal cannot be impeached on such a ground.

York v. Township of Osgoode (1892), 24 O. R. 12; (1894), 21 A. R. 168; (1895), 24 S. C. R. 282, distinguished.

Per BURTON, C.J.O., and MOSS, J.A., MACLENNAN, J.A., contra.—A person in possession of land under a lease with an option to purchase, no default having occurred, is not the owner of the land within the meaning of the Ditches and Watercourses Act, 57 Vict. ch. 55 (O.), and is not entitled to initiate proceedings thereunder.

Per OSLER, MACLENNAN, and MOSS, JJ.A.—Where land affected by a proposed work is vested in several persons as devisees in trust, none of them living upon the land, or in the municipality in which the land is situate, service of notice of proceedings under the Ditches and Watercourses Act upon one of them for all is sufficient; at any rate sections 23 and 24 cure any objection as to sufficiency of service.

Per OSLER, MACLENNAN, and MOSS, JJ.A.—Section 36 of the Act applies where a ditch has been completed and a new arrangement is necessary in regard to its maintenance; it does not apply where a ditch is being deepened or extended and for work of that kind the two years' limitation is not in force.

In the result the judgment of ARMOUR, C.J., at the trial was reversed, BURTON, C.J.O., dissenting.

Statement. THIS was an appeal by the plaintiffs from the judgment of ARMOUR, C. J.

The following statement of the facts is taken from the judgment of MOSS, J. A.

The plaintiffs in this action seek to recover from the defendants, under the provisions of the Ditches and Watercourses Act, 1894, a sum of \$360.38 for work done by the plaintiff Patrick Gaffney upon a ditch, and a further sum of \$18, the fees and charges of the plaintiff John Roger for services as an engineer in and about the letting of the said work to the plaintiff Gaffney.

The demand is based upon a certificate in writing, dated the 4th of December, 1895, made by the plaintiff Roger pursuant to the provisions of sections 28 and 29 of the Act in the form prescribed by section 29.

The certificate is in turn based upon an award made by the plaintiff Roger, dated the 29th of July, 1895, in the form prescribed by section 16, sub-section 2, of the Act. Statement.

The proceedings which led to the making of the award and certificate may be summarized as follows :

On the 11th of June, 1895, one Timothy Kelly, who is alleged to be the owner of the north half of lot 35 in the 5th concession of Logan, filed with the clerk of the township of Logan a declaration of ownership of said premises in the form prescribed by section 7 of the Act, declaring himself the owner within the Act in fee simple, and on the same day received from the clerk a notice or notices, according to Form (C.) prescribed by section 8 of the Act, for service upon the owners under the Act of lands affected by a proposed ditch from his land, notifying them of a friendly meeting to be held on the 26th of June, 1895, at 1 o'clock p.m. in the vicinity of his land.

June 12.—A copy of this notice served personally upon Thomas F. Coleman, one of the executors of Dr. Thomas T. Coleman, deceased, and a co-owner, under the latter's will, of lots 2 and 3 and the east half of lot 4 in the 5th concession of the township of McKillop, and also upon the owners of all the other lands to be affected by the proposed ditch.

June 26.—Meeting held when all the owners present except the Colemans, but no agreement arrived at. Requisition by Kelly to the clerk of Logan in the Form (E.) prescribed by section 13 of the Act for appointment by the township engineer of a time and place to attend and examine the locality, hear evidence, and make his award.

June 27.—Copy of requisition sent to the plaintiff John Roger, the township engineer.

July 7.—Appointment by latter of July 23rd for meeting to be held at the premises sent to clerk, by whom copy sent to Kelly.

July 8.—Notice in Form (F.) prescribed by section 14 of the Act sent to the Colemans by registered letter addressed T. F. Coleman, Seaforth, he and his co-owners

Statement. not residing in the township of McKillop (see section 3, "non-resident," and section 15). This notice admitted to have been received by Coleman.

July 23.—Engineer attends and examines the locality on that and subsequent day or days. Present, T. F. Coleman on the first day but not on the subsequent ones.

July 29.—Engineer makes his award in Form (G.) prescribed by section 16, sub-section (2), of the Act, directing construction of ditch and defining portions to be done and manner of doing by the various owners, and, among the others, the work to be done by the Colemans upon lots 2 and 3 and the east half of lot 4 in McKillop.

August 2.—Copy of award filed in office of the clerk of the township of McKillop pursuant to section 18 of the Act.

August 3.—Notice of filing award and of work to be done sent by clerk of McKillop to the Colemans by registered letter addressed to E. C. Coleman, Seaforth, one of the executors of Dr. T. T. Coleman, and a co-owner of the above land, not resident in McKillop. It is admitted that this notice was received by a clerk of Coleman Brothers at Seaforth, but, it is said, was not communicated to them.

Copy of award filed with clerk of Logan and notices sent to all parties interested.

August 9.—Letter signed "The Estate of T. T. Coleman, *per* E. C. Coleman, Manager," to the clerk of Logan, stating that they had been told by two persons that award had been made, and complaining of want of notice.

August 17.—Last day for appealing from the award under section 22 of the Act.

August 23.—Letter signed "The Estate of T. T. Coleman," to clerk of McKillop, referring to information received from clerk of Logan that award made, and complaining of want of notice in time to appeal.

Reply by post card stating that notice sent by registered letter on 3rd August.

August 24.—Further letter signed "The Estate of T. T. Coleman," reiterating denial of receipt of notice.

August 27.—Post card from clerk of McKillop in reply, *Statement,* stating that registered letter was posted on 3rd and should have been received on 5th August, and that time for appealing had expired.

October 10.—Time for completion of work required to be done by the Colemans under the award expired.

Notice from Kelly to the engineer that work not done on the Colemans' lands, and requiring him to attend to it *i.e.*, a notice to inspect (section 28).

October 11.—Letter from E. C. Coleman to clerk of Logan threatening injunction proceedings.

October 16.—Notice from engineer to Coleman Brothers, dated October 15, sent by registered letter addressed "Estate of T. T. Coleman, Seaforth," notifying of appointment of October 23rd, at 4 o'clock p.m., when he will attend in vicinity of premises to let the work required to be done through the Coleman premises.

October 18.—Letter from E. C. Coleman to clerk of Logan, presumably after receipt of the engineer's notice of October 15th, stating that estate has taken legal advice, does not consider it is bound by the proceedings, does not concur in the proposed work, which, if done, must be done at risk of those doing it.

Notices posted as required by section 28 (*a*) of the Act in three conspicuous places four clear days before October 23rd.

October 23.—Engineer attended and let work to Patrick Gaffney for \$360.38. No one attended for Coleman estate (see section 28).

December 4.—Engineer inspected work done by Gaffney, and made certificate in writing in Form (H.) prescribed by section 29 of completion of work and that Gaffney is entitled to \$360.38, and that his own fees are \$18.

Certified copy of above certificate admitted to have been forwarded by clerk of Logan to and received by clerk of McKillop, and notice by him to the Colemans. Section 20 of the Act.

Statement. McKillop paid to Logan \$30 costs of the award of the 29th July, 1895, and the Colemans paid to McKillop \$10, their share.

The action was tried at Goderich on the 1st of June, 1897, before ARMOUR, C.J., and he dismissed it, holding that Kelly was not an owner and that, under *York v. Township of Osgoode* (1892), 24 O. R. 12; (1894) 21 A. R. 168; (1895) 24 S. C. R. 282, the proceedings were therefore void.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 24th of March, 1898.

Garrow, Q.C. for the appellants. This case is not governed by *York v. Township of Osgoode* (1892), 24 O. R. 12; (1894) 21 A. R. 168; (1895) 24 S. C. R. 282. Kelly was an owner within the meaning of the Act, or at all events had a substantial interest in the land: *Ball v. Canada Company* (1876), 24 Gr. 281; and that gave him the right to initiate proceedings. [Moss, J.A., referred to *Henrihan v. Gallagher* (1862), 9 Gr. 488, (1864) 2 E. & A. 338.] Even if Kelly was not, strictly speaking, an owner within the meaning of the Act, it is now too late to give effect to the objection; the question should have been raised by appeal to the County Judge, and section 24, which was not in force when *York v. Township of Osgoode* was decided, prevents it from being raised now. It is also objected that proper notice was not given to the Colemans. They were, however, non-residents, and notice was admittedly given to one of them of each proceeding, and notice to one was sufficient: *Doe d. Strickland v. Roe* (1846), 4 D. & L. 431. If there is anything in the objection it is cured by sections 23 and 24. The proceedings were taken under section 33 and not under section 36, and the two years' limitation does not apply; but if it does, the evidence shews that the previous work had been completed more than two years before the initiation of the present proceedings.

Shepley, Q.C., for the respondents. Kelly was merely

a tenant of the land and not entitled to initiate proceedings. The whole foundation is, therefore, wanting, and the curative sections do not apply. Moreover, notice was not given to the Colemans, who are admittedly owners affected by the work, and without notice the proceedings are void. Even if the proceedings are held to be regular there is no right of action by one township against another: section 38. The engineer did not, as required by the Act, make an estimate of the cost.

Garrow, Q.C., in reply.

November 15th, 1898. OSLER, J. A. :—

I think we may uphold the proceedings taken for the construction of this drain and the action of the engineer of the plaintiff township without infringing upon anything that was decided in *York v. Township of Osgoode* (1894), 21 A. R. 168; (1895) 24 S. C. R. 282.

I rest my decision very much upon the changes made by recent legislation on the subject as found in the Act of 1894, amended by the Acts 58 Vict. ch. 54, sec. 1 (O.), and 59 Vict. ch. 67, sec. 1 (O.), and now found in the Revised Statutes of 1897, ch. 285.

Under the former Act the proceedings, after failure to effect a friendly agreement, were initiated by the filing by the landowner who desired the construction of the ditch in the office of the clerk of the municipality of the requisition mentioned in section 6, and it was expressly enacted that where it was necessary in order to obtain an outlet that the ditch should pass through the lands of more than five owners, the first-mentioned owner being one, the requisition should not be filed unless such owner should first obtain the assent in writing thereto of, including himself, a majority of the owners affected or interested.

In the proceedings in question in *York v. Osgoode*, this negative provision had been disregarded, the requisition not having been sufficiently signed in consequence of two of the landowners' names having been omitted therefrom

Judgment.

OSLER,
J.A.

altogether, while one of the signatories, the person who was setting the proceedings in motion, was found not to be in law an owner. The foundation of jurisdiction was absent, and the Act attaching no effect to the result of an appeal or the omission to appeal, there was nothing to prevent an owner of land affected by the award of the engineer from objecting to the award at any time before it had been acted upon by the construction of the drain upon his own land.

By the new Act, section 5 (1), every ditch to be constructed under the Act shall be continued to a sufficient outlet, but shall not pass through or into more than seven original township lots, exclusive of road allowances, unless (which was not the case to be provided for here, the drain in question being within the limit) the council of the municipality upon the petition of a majority of the owners of all the lands to be affected should pass a resolution authorizing its extension. Then section 7 (1) enacts that any owner (other than the municipality) shall, before commencing proceedings, file with the clerk of the municipality in which the land requiring the drain is situate a declaration of ownership thereof in the form prescribed, and, by subsection (2), that in case of omission to file such declaration of ownership at the time aforesaid the judge of the county court "may, in case of such ownership at said time," permit it to be filed at any stage of the proceedings upon such terms as he may impose or direct.

Then, the declaration of ownership having been filed, the next step to be taken by the declarant before taking compulsory proceedings and calling in the engineer is to serve upon the owners and occupants of the other lands to be affected a notice of a friendly meeting, at which all the owners may settle the matter among themselves and enter into an agreement for the construction of the ditch. If they fail to do so, then the owner requiring the ditch, who has already filed a declaration of ownership, files with the clerk of the municipality a requisition in the prescribed form, requesting that the engineer be asked to appoint a

time and place to make an examination of the locality and an award under the Act.

Judgment.

OSLER,
J.A.

Passing over the sections relating to the proceedings of the engineer, section 22 provides for an appeal to the county judge within fifteen clear days after the filing of the award by any owner dissatisfied therewith. The appeal is to be by notice in writing, shortly setting forth the grounds of the appeal. Section 24, which is a new clause, enacts that "every award made under the provisions of this Act shall after the lapse of the time hereinbefore limited for appeal to the judge, and after the determination of appeals, if any, by him, where the award is affirmed, be valid and binding to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act."

One of the objections mainly relied upon by the defendants is that Timothy Kelly, the person who set the proceedings in motion, was not entitled to do so not being the "owner" of the parcel of land requiring the ditch. His title was that of lessee of the Canada Company with the usual option of purchase at a named price.

This objection is not raised by the pleadings nor had it been set up at any stage of the proceedings in question. It seems to have been suggested quite incidentally in the course of the trial. But whether well founded or not I am of opinion that it is not open to the defendants. Kelly made and filed a declaration of ownership as required by section 7 (1). That, together with the requisition required by section 13, constituted the foundation of the jurisdiction of the engineer. Obviously the Legislature attached some importance to the declaration as something to be placed on record in the clerk's office shewing or alleging the right of the declarant to institute the proceedings. It was prescribed for the first time by the Act of 1894. If it is omitted to be filed at the proper time the omission must be supplied and that can only be done by the order of the

Judgment.

OSLER,
J.A.

county judge upon being satisfied that the party who should have filed it was the owner at that time. In that case the judge enters upon an enquiry. If he determines that the party was the owner and allows the declaration to be filed, can his adjudication afterwards be reviewed otherwise perhaps than by himself on appeal from the award? In my opinion it cannot. If then a declaration of ownership filed by permission of the county judge sufficiently establishes the ownership for the purpose of the proceedings taken under the Act, it seems to follow that the proper time and place to impeach it, where it has been filed without such order, is at latest on appeal from the award to the same judge. If he may enquire into the question of ownership of the declarant at one stage it seems to me that the Act intended it must also be the subject of appeal to him at another. *Primâ facie* the declaration having been filed the engineer had jurisdiction and if all proceedings under the award have been taken without any attack having been made upon his jurisdiction by an appeal in the prescribed manner the fullest effect ought to be given to the new section 24, and the award held to be valid and binding to all intents and purposes notwithstanding any defect in form or substance, either in the award itself or in the proceedings taken under the provisions of the Act. That the declarant was not the legal owner would seem to be a considerable defect in substance in the proceedings, yet it is quite reasonable that it should be cured by the omission of owners of other lands to object to it at the proper time. How unreasonable it is that they should lie by as they have here done until after all works under the award have been completed is forcibly pointed out in the judgments of my learned brothers. I think it was the intention of the new Act that this should no longer be possible and therefore that the objection as to the declarant's ownership fails.

It was next contended by the defendants that the notice required to be given under section 8 of the Act, *i.e.*, of the friendly meeting, had not been given to persons named

Judgment.

OSLER,
J.A.

Coleman, the owners of lots 2 and 3 and the east half of lot 4 in the 5th concession of McKillop, and also that those required by section 14 of the appointment by the engineer were not served upon these parties. They were executors and trustees of the will of their deceased father. They held the lands as devisees under the will and were beneficially interested therein. The first notice was served upon T. F. Coleman, the second was addressed to him and came to the notice of E. C. Coleman, his co-trustee, and he with the latter's knowledge attended on the ground on one of the days during which the engineer was making his examination. These two co-owners were between them the managers of the estate, and there can be no reasonable doubt upon the evidence that both notices came to the knowledge of each of them. I think this is all that is reasonably necessary having regard to the provisions of section 23, which enacts that the award shall not be set aside for want of form only or on account of want of strict compliance with the provisions of the Act.

It was further objected that the proceedings had been taken, not under section 33, for deepening, widening, etc., of the ditch made under the McKenna award, but for reconsideration of that award under section 36.

Here, again, if necessary to invoke them, the proceedings are saved by sections 23 and 24. No doubt, in form, the requisition speaks of reconsideration, but it was "the proposed ditch" for which the engineer was to make his examination and award. What was needed was an extending, and deepening and widening of the old ditch. That was what all parties were thinking of at the friendly meeting and the engineer's examination, and that was the subject of the award which, as I have said, was not appealed from. The defect in form of the requisition is consequently cured.

Lastly, it is said that the engineer made no estimate of the cost of the ditch, shewing that it was not in excess of the statutory limit, \$1,000, and that was a condition precedent to his jurisdiction.

Judgment.

OSLER,
J.A.

What the Act says, section 5 (2), is that no ditch, the whole cost whereof according to the estimate of the engineer or the agreement of the parties will exceed \$1,000, shall be constructed under the provisions of the Act. The engineer did, in fact, make an estimate as appears by his award—on what principle I confess I cannot understand—but of a sum very much below what would necessarily be the actual cost of construction, but also below the sum of \$1,000, and it was proved that the actual cost of construction was not anything like the latter sum. There is nothing in the objection.

The plaintiffs are, therefore, entitled to recover from the defendant township, under section 20 of the Act, the sum certified by the plaintiffs' engineer to be due to the contractor for the cost of constructing that part of the ditch which the Colemans should have made under the award through their own land, together with interest thereon, and the costs of the action and the appeal.

Whether under the obligation imposed on the defendants under section 20, which seems to be different from that imposed by the corresponding section of the former Act, R. S. O., 1887, ch. 220, sec. 26, they had the right to set up the defences they have relied upon, I have not considered, as no point was made upon that. Neither do I express any opinion as to the position of persons whose lands are affected by a drain, but who have not been described as owners in the proceedings for its construction; nor upon any question which may be raised with regard to the validity of proceedings dependent upon the resolution of the council passed under section 5 (1).

The appeal should be allowed.

MACLENNAN, J. A. :—

The Act under which the proceedings, which are the subject of this action, were taken, namely 57 Vict. ch. 55 (O.), is different in several respects from the Acts upon which the case of *Yorke v. Township of Osgoode* (1894), 21 A. R.

168; (1895) 24 S. C. R. 282, referred to by the learned Chief Justice, was decided. The later Act contains a definition of the word "owner," section 3, and also a declaration that after the time for appealing against the award has elapsed, whether an appeal has been taken or not, an award shall be valid and binding, notwithstanding any defect in form or substance either in the award or in the proceedings.

The objection to which the learned Chief Justice gave effect was that Kelly was not an owner within the meaning of the Act. Kelly's title was a lease from the Canada Company, dated the 2nd of April, 1895, at an annual rent of \$54, and containing a covenant by the company that if the lessee, having been guilty of no default at any time, should at any time during the term pay the lessors \$1,350 in addition to all rents and taxes the lessors would convey the land to the lessee in fee simple. Kelly had had a previous lease for several years on similar terms, and it was not suggested that he had been in any default. The first question, therefore, is whether the learned Chief Justice was right in holding that Kelly was not an owner. One of the definitions of an owner under section 3 is "a person entitled to sell and convey the land," and I am clearly of opinion that under the covenant of the Canada Company Kelly is such a person. All he has to do is to pay the company the sum agreed upon, and he then becomes the owner to all intents and purposes, with full power to sell and convey. The circumstance that he must pay for the land first cannot make him less an owner, within the definition, than if he had exercised his option and paid his money, but had not got his conveyance; or than a person, who being owner, had mortgaged his land for a large sum. The essential part of the definition is his right and power to sell and convey, he being a person "entitled" to do so. In *York v. Osgoode*, this Court was careful to say that even under the former Act a substantial interest, though less than freehold, would suffice.

I therefore think the judgment cannot be upheld on

Judgment.
MACLENNAN,
J. A.

Judgment.
MACLENNAN,
J.A.

the ground on which it was rested by the learned Chief Justice. The judgment was, however, supported on other grounds, and principally on the want or insufficiency of notice to persons of the name of Coleman through whose land the ditch passes. That land had belonged to one T. T. Coleman, who, having made his will, died in 1893. By his will he gave and devised all his estate, real and personal, to his executors, namely, his wife and two of his sons, all of whom accepted probate. The whole estate was given upon trust to pay debts, to hold his residence and household effects for the use of his wife for life, and at her death for her four children equally, as to the rest of all his property, one-third was to be held in trust for his wife absolutely, and the remaining two-thirds for his children equally. The executors were authorized to carry on the testator's business for a period not exceeding five years, and any profit or loss was to belong to the estate. The estate was not to be finally divided until all his businesses in which he was engaged should be wound up; but they might divide any property not required for the business at any time when convenient. At the time of the proceedings in question there had been no division of the lands affected by the ditch, and those lands were therefore held by the executors upon the trusts which have been mentioned. The testator's business had been that of a manufacturer of salt and agricultural implements, and had been carried on at Seaforth, where he resided, and at the time of the transactions in question the business was still carried on at Seaforth by the executors. Neither the executors nor any of the testator's family resided on the lands in question. In the award and the papers which preceded it, the persons named as interested in the Coleman lands are described as Coleman & Bros., and the evidence is that the executors and beneficiaries were not notified of the proceedings separately and individually. The notice required by section 8 was served upon T. F. Coleman, one of the executors, and that required by section 14 was received by E. C. Coleman, another of the executors, who communicated

it to T. F. Coleman, and the latter attended upon the ground while the engineer was examining it for the purpose of his award. A copy of the award was duly posted by registered letter by the township clerk of McKillop to E. C. Coleman, on the 3rd of August, as required by section 18, and was received by a clerk who had authority to do so, although Coleman says it was not delivered to him in time to enable him to appeal against it. It is objected that each executor and each beneficiary should have been notified, and that the proceedings are invalid. I am of opinion that the notices were sufficient. Section 15 provides that notices shall be served personally or by leaving at the place of abode of the owner or occupant, with a grown up person residing thereat, and in case of non-residents, then upon the agent of the owner, or by registered letter addressed to the owner at the post office nearest to his last known place of residence. It is admitted that neither the executors nor any of the beneficiaries were resident upon the land or in the municipality in which it is situate, but were, therefore, non-resident within the meaning of the Act; therefore the award was duly served upon E. C. Coleman at all events, although his clerk may not have delivered it to him. The other notices were also duly served upon two of the executors, for it is admitted that they came to the personal knowledge of two of them, and were acted upon by them. The only question then is whether it was necessary also to serve all the executors, and I do not think so. The statute defines an owner (section 3) to include the executor or executors of an owner, and section 15 authorizes service upon an agent of the owner or even upon an occupant of the premises, or any grown up person residing thereon. Now E. C. Coleman and T. F. Coleman were not only executors but also beneficiaries of the estate, and describe themselves as managers, and it is admitted that they did in fact, at an early stage of the proceedings, attend to the business. In many cases it has been held that notice to one executor is sufficient. In *Doe d. Strickland v. Roe* (1846), 4 D. &

Judgment.

MACLENNAN,
J.A.

Judgment. L. 431, it was held that service on one executor was sufficient in ejectment, and *Smith v. Smith* (1833), 2 Cr. & M. 231; and *Meux v. Bell* (1841), 1 Ha. 73, are other cases in which notice to one executor was held to be notice to all.

MACLENNAN,
J.A.

It was also objected that the proceeding was under section 36 for the reconsideration of the old award, and that it was of no effect inasmuch as two years had not elapsed since the completion of the construction under the former award. I do not think section 36 has any application to a case like the present of deepening and widening a ditch already constructed. This is provided for by section 33, in respect of which there is no limit of time imposed. Section 36 is for the reconsideration of the agreement or award, but says nothing about new work. It deals with a completed work, and all that would be left for reconsideration after two years from completion would be its maintenance, as to which, upon reconsideration, a new agreement or a new award might then be made. See also section 34. The initiatory notices in this case do speak of reconsideration, but it is reconsideration not of the old award, but of an award drain for the draining of the applicant's land, and with the object of agreeing upon the respective portions of the work and materials to be done and furnished by the several owners, etc. I think, therefore, this is a proceeding under section 33 for deepening and widening a ditch already constructed, as to which there is no limit of time.

Mr. Shepley also objected that the engineer had made no estimate of the whole cost of the work, section 5 (2), but I think that is not so, for he has distinctly estimated the cost of the work and materials to be done and supplied by each of the contributories, from which the estimated cost of the whole is apparent.

I am, therefore, of opinion that the defences fail and that the plaintiffs are entitled to judgment for the amount claimed under and by virtue of section 20 of the Act.

The appeal should, therefore, be allowed.

Moss, J. A. :—

Judgment.

Moss,
J.A.

Under the provisions of sections 20, 27 and 30 of the Act, upon receipt of an engineer's certificate by the clerk of a municipality affected, it becomes the duty of the council to pay the amounts therein mentioned; and apparently payment would have been made by the defendants in this case but for the attitude of the Colemans, who took the position that they were not liable and would resist the collection of the amounts if the defendants sought to collect them out of their lands pursuant to the Act.

The defendants put forward a number of defences to the claim, and at the trial evidence was gone into bearing upon the question of Kelly's ownership and the regularity of the proceedings leading to the award and certificate.

Kelly holds under a lease from the Canada Company, dated the 2nd of April, 1895, demising the premises to him for a term of seven years from the 1st of February, 1895, at a yearly rental of \$54. The lease also contains a covenant by the lessors that if the lessee shall at any time during the continuance of the term (no default nor breach of covenant having been at any time made by the lessee and not otherwise) pay to the lessors the sum of \$1,350 in addition to all rents due or accruing with interest to the day of payment and all taxes and rates, the lessors shall convey the land in fee simple to the lessee. There was a former lease for a term of seven years from the 1st of February, 1888, at an annual rental of \$90, which contained a similar covenant for conveyance upon payment of \$1,500. And there is produced a receipt by the Canada Company shewing that there is a sum of \$150 at Kelly's credit with the company which is expressed to have been paid by him in consideration of the grant to him of the lease of April 2nd, 1895.

The learned trial Judge ruled that Kelly was not an owner within the meaning of the Ditches and Watercourses Act, 1894, and in this I agree with him.

Judgment.

Moss,
J.A.

As shewn by the decided cases, Kelly occupies two positions with regard to the land. He is a lessee for years, and in that capacity he is certainly not entitled to claim to be an owner. He is also the holder of an option to become the purchaser of the land upon compliance with certain conditions, non-compliance with any of which before payment of his purchase money would forfeit his right. It does not strengthen his position that the option is given in the same instrument under which he is lessee of the term: *Henrihan v. Gallagher* (1862), 9 Gr. 488, and in appeal (1864), 2 E. & A. 338; *Ball v. Canada Company* (1876), 24 Gr. 281, and cases there cited.

The Canada Company is not in a position to compel him to exercise his option and become a purchaser. On the other hand he may forfeit his right under the option by failure to observe the conditions.

I think, looking at the decision in *Yorke v. Township of Osgoode* (1894), 21 A. R. 168, and in the Supreme Court (1895), 24 S. C. R. 282, and the reasons for it, that Kelly's position is not that of an owner. See also *In re Flatt and Counties of Prescott and Russell* (1890), 18 A. R. 1, *Helby v. Matthews*, [1895] A. C. 471, and the very recent case of *Friary Holroyd and Healy's Breweries v. Singleton* (1898), 15 Times L. R. 23.

But it is urged that under the interpretation section in the Act of 1894—which was not in the Act under which *Yorke v. Osgoode* was decided—"owner" means and includes any person entitled to sell and convey the land, and that Kelly is entitled to sell and convey the land. I do not so read these words. I think they were intended to apply to a person having a power under which he might sell and convey although the estate is not vested in him—a person entitled under a power of sale to convey and pass an estate vested in another. And I think the context supports this view.

I do not regard Kelly as a person entitled to sell and convey the land. He may sell and transfer his interest, but until he has obtained a conveyance from the Canada

Company, or at all events has paid his purchase money, he is not in a position to vest the estate in a purchaser from him.

Judgment.

Moss,
J.A.

If, therefore, this case resembled *Yorke v. Osgoode* in other respects and the circumstances and the law were the same as in that case the judgment appealed from ought to be affirmed.

But considerable changes have been made in the Act since the date of that decision, and much that did not come in question in that case has taken place in this.

It may be convenient to deal at this point with the other objection to the plaintiffs' right to which the learned Chief Justice gave effect, viz., that no sufficient notice of the proceedings was given to the owners of the lands belonging to the Coleman estate affected by the ditch.

These lands had been the property of one Dr. T. T. Coleman, who died in 1893, leaving a will, whereby he gave and devised his estate, real and personal, to his executors to hold upon trust, after payment of debts, as to the property in question with other property, one-third for his wife absolutely, and the remaining two-thirds for his children equally. Directions are given with regard to carrying on his business for a period not exceeding five years and the postponement of the final division until the business should be wound up. At the time of the institution of the proceedings in question there had been no division of the lands affected by the ditch, and the business was being carried on under the style of "The estate of T. T. Coleman," with E. C. Coleman as manager. The executors of the will were the testator's widow and two of his sons, E. C. Coleman and Thos. F. Coleman.

They were, therefore, within the definition of owners in the Act. And having regard to the terms of the will and the manner in which they were dealing with the property at the time, I think service upon any one of them may, for the purposes of the Act, be deemed notice to the owners.

So that for the purposes of the engineer's jurisdiction

Judgment.

Moss,
J.A.

to proceed under the Act, there was the declaration of ownership duly filed by Kelly and due service upon all the owners of lands affected by the proposed ditch of notice of the friendly meeting to be held on the 26th of June, 1895.

It is true that Kelly, not being an owner within the meaning of the Act, should not have taken the proceedings, and no doubt if any of the parties affected had raised the objection at the proper time the engineer would have deemed it his duty to defer the proceedings to give the party objecting an opportunity of disputing the correctness, and shewing the incorrectness, of the declaration.

But the objection was not raised at the friendly meeting, and the Colemans were afterwards served with notice of the engineer's appointment to examine the locality, take the evidence and make his award, and one of them attended on the first day, but no objection to Kelly's status was raised.

Then the engineer's award was made, and it became the duty of the defendants to notify the Colemans of it; and if there was defective notice to them, the defendants cannot be permitted to set it up against the plaintiffs. But, as the evidence shews, the Colemans were notified in accordance with the provisions of the Act, and the defendants were not to blame if the notice was not communicated by the Colemans' clerk to his employers.

No objection to Kelly's status was then raised either by the defendants or by Coleman, and Kelly's declaration of ownership under section 7 of the Act, filed in the office of the clerk of Logan on the 11th of June, 1895, remained unquestioned.

Under section 22 either the defendants or the Colemans, or both, might have appealed from the award within fifteen clear days from the 2nd of August, 1895, but no appeal was taken.

Section 24 provides that every award made under the provisions of the Act shall, after the lapse of the time limited for appealing, "be valid and binding to all in-

tents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act.”

Judgment.

Moss,
J.A.

By the award the Colemans were directed to do certain work upon the ditch and to complete it on or before the 10th of October, 1895.

They failed to comply with the direction and thereupon the engineer proceeded under section 28 to inspect the ditch, and after service of notice upon the Colemans and posting of the other notices required to be posted in conspicuous places in the neighbourhood, to let the work to the plaintiff Gaffney for \$360.38. Gaffney performed the work and the engineer thereupon made his certificate, upon which this action is brought.

The amount claimed therefore is for the performance of work to be done under the award, and under the provisions of sections 20, 27 and 30, the plaintiffs became entitled to payment by the defendants' council.

Can the defendants at this stage, when all the work directed to be done by all the owners, including that directed to be done by the Colemans, has been done, set up for the first time in an action to recover for work done under the award the objection that Kelly was not an owner within the meaning of the Act?

Should not the award and the certificate with reference to proceedings relating to work done under the award be deemed conclusive and binding upon the defendants? Or should they not be taken to have waived the objection and to have agreed to treat Kelly as the owner for the purposes of the proceedings?

It is to be observed that in the correspondence following the making of the award no objection is raised to Kelly's status as an owner. The complaint is of want of notice.

The declaration of ownership made by Kelly, and the notices of the friendly meeting and the failure to reach an agreement within the prescribed period thereafter, were sufficient to give the engineer jurisdiction to take the proceedings which resulted in the award and certificate.

Judgment.

Moss,
J.A.

It is nowhere made his duty to enquire *ex mero motu* into the correctness of the declaration, and in the absence of objection he and all the other parties to the proceedings may properly conclude that it is unobjectionable.

I cannot doubt that the intention of the Legislature was to make the declaration of ownership indisputable if not impeached in good season, and I think that is the effect of the Act.

It was open to the Colemans in the initiatory stages and to the defendants upon receiving a copy of the engineer's award to have questioned Kelly's ownership and put an end to the proceedings by shewing the incorrectness of the declaration, and I think they should have done so then. As remarked by Erle, J., in the course of the argument in *In re Jones v. James* (1850), 19 L. J. Q. B., at p. 258: "Jurisdiction is sometimes contingent; in such case if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards."

It appeared in that case that the defendant had been served with an order from which it appeared as if the leave of a judge to bring the action in the court had been obtained, although it had not in fact been obtained; but this did not assist the defendant in his subsequent application for a prohibition: see *Moore v. Gamgee* (1890), 25 Q. B. D. 244, at p. 248.

The engineer's award was made with the acquiescence of all parties. It was not appealed from. Was he not then justified in proceeding to let to Gaffney the performance of work ordered to be done by the award and not done by the owners? And was not Gaffney entitled to rely upon the award and the provisions of the Act which make the council of the municipality in which he performs the work liable to pay him for it?

If not, neither the engineer nor any contractor under him could safely undertake to perform any service under the Act without first enquiring into every proceeding. I do not think the Act imposes this task upon them. It is

sufficient, I think, for the engineer to know that a declaration of ownership has been filed, and that the prescribed notices have been properly served, and for the contractor to know that an award has been made and has not been set aside on appeal.

It was also argued on the appeal before us that there was want of jurisdiction because the engineer had made no estimate of the cost of the whole work so as to ascertain whether this was a proper case for proceeding under the Act. But I think it appears from the award and otherwise that a sufficient estimate was made and that upon it the engineer was justified in proceeding.

It was also objected that the proceeding was one for reconsideration under section 36, and that two years had not elapsed since the completion of the ditch made under the former award.

I think it is shewn that this proceeding was under section 33 and not under section 36, but at all events the evidence sufficiently establishes that the former drain, although an imperfect drain, had been completed according to the terms of the award more than two years before the filing of Kelly's declaration of ownership.

I think the appeal ought to be allowed and judgment entered for the plaintiffs with costs.

BURTON, C. J. O. :—

After some fluctuation of opinion, and contrary, I must confess, to my first impression, I have after consideration come to the conclusion that the judgment appealed from should be affirmed.

I am unable to agree that under the definition given in the interpretation clause of the present Act, 57 Vict. ch. 55, sec. 3 (O.), Kelly, the party initiating the proceedings, was an owner within the meaning of the Act. He had nothing but an option, which does not enable him to sell and convey the land. Test it in this way: could the Canada Company, as proprietors of the fee simple, have initiated

Judgment.

Moss,
J.A.

Judgment.

BURTON,
C.J.O.

or taken part in initiating proceedings under the Act? If so, there would be two owners of the same property.

The present Act contains a provision not to be found in the former ones, which, in addition to the preliminary proceedings, requires a declaration of ownership to be filed before their commencement, but that declaration has to be made by a person who is an owner; if filed by a person who is not, the fact that a declaration has been made will no more give the engineer jurisdiction than would the filing of the requisition under the former Act unless there is some legislative declaration that it shall have that effect unless objected to within a reasonable time.

Section 10 providing that certain informalities in the proceedings under sections 8 and 9 are not fatal does not reach the case, nor do I see before whom the objection could have been taken. A prohibition might have been applied for, but if the engineer was without jurisdiction the proceedings, including the award, are invalid.

Section 22 assumes that the engineer had jurisdiction to make the award, and empowers the judge to correct errors in it or set it aside if he finds the engineer has acted partially or improperly, but I think that section 24 does not extend to any thing more than to make the award valid, notwithstanding any defect in form or substance either in the award itself or any proceedings relating to the works to be done thereunder, but does not give jurisdiction to the engineer to make an award when the proceedings have been initiated by persons who had no authority to take them.

If such an objection were taken before the engineer it does not appear to me that he would have any power to deal with it. He might well say, that is not a matter which I am authorized or competent to decide; if it is a valid objection I should imagine that your proper course would be to apply to the proper court to prohibit me from proceeding. I find the notices prescribed by the statute have been given, and that being so my duty is pointed out in section 16 and subsequent sections.

If the statute had said that filing the declaration should be sufficient until set aside to warrant the engineer in assuming the initiating party to be an owner within the meaning of the statute, it would have been a different thing, but upon the best consideration I have been able to give to the matter there is nothing to shew any waiver on the part of the Colemans or these defendants, or anything to estop them from objecting to the want of jurisdiction of the engineer. If that view be correct, it is not necessary to consider the other objections.

Judgment.

BURTON,
C.J.O.

I quite agree that when once the jurisdiction is established the court ought to strive as much as possible to uphold the proceedings against any formal objections, but this objection goes to the root of the proceedings and is not one of form.

I have carefully read and considered the judgments prepared by my learned brothers, holding that the Colemans and all others are now estopped in this action against the municipality from raising this objection. There is great force in the reasoning in favour of that view and everything in favour of that being the law, and after reading them my mind is left, I must confess, in great doubt, but as my judgment cannot affect the result, I think I must adopt the rule which has grown into a proverb, "that gravely to doubt is to affirm." I feel that under these circumstances I ought not to interfere with the decision of the court of first instance, and I do this the more readily as it is to be hoped that the Legislature, finding this grave difference of opinion, will place the matter beyond doubt by providing that if the objection is not taken within a specified time the proceedings shall be valid to all intents and purposes.

I am, I confess, much pleased that the majority of the Court have been able to come to a different conclusion, which ought to be the law if it is not.

Appeal allowed, BURTON, C. J. O., dissenting.

R. S. C.

PORT ARTHUR HIGH SCHOOL BOARD V. TOWN OF
FORT WILLIAM.

Schools—High Schools—Pupils from Adjacent Municipality—Municipal Corporations—"Municipal Council"—Mandamus.

Under its Act of Incorporation, 47 Vict. ch. 57 (O.), the town of Port Arthur has the same rights and powers in regard to the organization and maintenance of high schools as other incorporated towns.

A board of trustees of a high school may be appointed by resolution of the municipal council having jurisdiction ; a by-law is not necessary.

The opinion bearing on this point expressed in *Township of Pembroke v. Canada Central R. W. Co.* (1882), 3 O.R. 503, at p. 508, preferred to that in *Dawson v. Town of Sault Ste. Marie* (1889), 18 O. R. 556.

By 60 Vict. ch. 14, sec. 73 (O.), it is enacted that "the municipal council * * * shall pay for the maintenance of pupils * * *."

Held, that the municipal corporation and not the individual members of the council are liable.

Judgment of FALCONBRIDGE, J., ordering the town of Fort William to pay to the Port Arthur High School Board a proportion of the cost of maintenance of the high school in respect of pupils residing in the town attending the high school affirmed, but that part thereof directing a mandamus to the mayor and councillors of the town to pass a resolution to the treasurer to pay the amount struck out as unnecessary.

Statement. THIS was an appeal by the defendants from the judgment of FALCONBRIDGE, J.

The action was brought against the town of Fort William and the mayor and councillors thereof, for payment by the town of \$317.92, the proportion, as fixed by the district Judge, of the cost of maintenance of the Port Arthur High School payable in respect of pupils resident in the town of Fort William attending it, and for a mandamus to compel the mayor and councillors to pass a resolution directing the treasurer to pay this sum.

The facts and arguments are stated in the judgment.

The action was tried at Port Arthur on the 23rd of June, 1898, and on the 29th of July, 1898, judgment was given in the plaintiffs' favour.

The appeal was argued before BURTON, C. J. O., MACLENNAN, MOSS, and LISTER, JJ. A., on the 17th of November, 1898.

George Bell, and *T. C. Thomson*, for the appellants.
Aylesworth, Q. C., for the respondents.

Judgment.

Moss,
J. A.

December 28th, 1898. The judgment of the Court was delivered by

Moss, J. A. :—

From the scanty information in the shape of evidence furnished to the Court at the trial of the action, there can be gathered what very probably might have been made quite clear, viz., that in the year 1887, the municipal council of the town of Port Arthur appointed a board of high school trustees, who met and organized on the 28th of July, 1887, and immediately took steps to appoint a secretary-treasurer, and made arrangements for obtaining rooms and appointing a teaching staff; that the council afterwards passed two by-laws for procuring the funds necessary for the erection of suitable buildings; that afterwards a site was procured and a school house erected at a cost apparently of \$11,500; that the school has ever since been carried on and maintained as a high school, performing the functions of a high school, and has been the recipient of municipal and government grants payable by law to high schools, including the government grant for the year 1897 amounting to \$985.78.

The town of Fort William was incorporated in 1892, but previous to that, and while it was a village forming part of the municipality of Neebing, children whose parents resided there attended the high school at Port Arthur; and from the time of the incorporation of Fort William children resident there have continuously attended, and received education at, the Port Arthur high school.

Prior to 1897 there were no statutory means of compelling the town of Fort William to contribute to the expenses of the maintenance of the high school in respect of the pupils attending from that town, but in that year the Legislature enacted [60 Vict. ch. 14, sec. 73 (O.)] by way of

Judgment.

Moss,
J.A.

amendment to the High Schools Act of 1896, that the municipal council in every town in a judicial or territorial district should pay for the maintenance of pupils of such town who attended a high school in any other town in the same district at the rate per pupil (after deducting the legislative grant), payable for the pupils of the town in which the high school is situate, the amount to be settled, in case of dispute as to it, as in the case of county pupils under the High Schools Act.

Acting under this provision the plaintiffs in the early part of 1898 demanded of the council of Fort William the sum of \$311.95 as its proportion of the maintenance from the 13th of April, 1897, to the end of the year.

The council did not accede to the demand, and the amount was thereafter settled and adjusted by the Judge of the district, who awarded that the council of Fort William should pay to the plaintiffs for the maintenance of the pupils of Fort William who attended the high school at Port Arthur for the period between the 13th of April and the 31st of December, 1897, the sum of \$311.95, together with \$5.97, its proportion of the costs of the reference, making in all the sum of \$317.92.

Payment of this sum being refused, this action was brought on the 28th of April, 1898, against the corporation of the town of Fort William and the mayor and councillors.

In the body of the statement of claim the plaintiffs pray that the mayor and councillors may be ordered by mandamus to pass a resolution directing the treasurer to pay out of the funds of the corporation the sum demanded.

The claim proper prays that the corporation may be ordered to pass the resolution, and that judgment may be recovered against the corporation, and that the defendants may be ordered to pay the plaintiffs' costs of the action.

All of the defendants, appearing by the same solicitor, deny the plaintiffs' incorporation and their right to maintain this action, and the mayor and councillors also submit that they should not be required by mandamus to pass a

resolution, inasmuch as there are other and ample remedies if the corporation is liable, and that they are not necessary parties to the action.

Judgment.

Moss,
J.A.

If it be assumed that the school which has been carried on as a high school at Port Arthur ever since 1887 is a high school under the school law, it can hardly admit of question that the amendment of 1897 applies so as to entitle the plaintiffs to recover from the corporation the sum awarded by the district Judge.

We then have the case of pupils of a town attending a high school in another town in the same judicial or territorial district, and the amount payable in respect of their attendance settled as directed by the enactment.

But it was urged that the plaintiffs were not a corporation and the school not a high school, inasmuch as in 1887 the law did not enable a town to establish a high school or high school board.

The town of Port Arthur was incorporated by a special Act of the Legislature of Ontario passed in the year 1884 (47 Vict. ch. 57). The first section enacts that on and after the date of the passing of the Act the district described in the Act shall be separated from the municipality of Shuniah, and the inhabitants thereof shall be and hereby are constituted a corporation or body politic under the name of "The Corporation of the Town of Port Arthur," and shall enjoy and have all the rights, powers and privileges enjoyed and exercised by incorporated towns in the Province under existing municipal laws of the said Province (except where otherwise provided by the Act).

The 4th section enacts further with regard to matters consequent upon the formation of new corporations under the then Municipal Act and amendments thereto.

Nothing in the Act confines the powers in respect of high schools to be exercised by the town within narrower limits than those possessed by incorporated towns under the existing municipal laws.

Among the powers possessed by incorporated towns, at the date of the incorporation of Port Arthur, was that of

Judgment.

Moss,
J.A.

passing by-laws for obtaining the real property requisite for erecting high school houses thereon, and for other high school purposes, and for preserving, improving and repairing such school houses, and for disposing of such property when no longer required, and for making provisions in aid of such high schools as might be deemed expedient: Municipal Act, R. S. O., 1877, ch. 174, sec. 465 (5 & 6); High Schools Act, R. S. O., 1877, ch. 205, sec. 32 (2 & 3); and for making provision by local assessment in addition to other assessments for procuring sites for high schools, for renting, building, repairing, furnishing, warming and keeping in order high school houses, and their appendages, grounds and enclosures: High Schools Act, R. S. O., 1877, ch. 205, sec. 32 (1).

It was also the law that for all high school purposes every town separated for municipal purposes from the county in which it was situate should be a county, and its municipal council should be invested with all the high school powers possessed by county, city or town councils: High Schools Act, R. S. O., 1877, ch. 205, sec. 11.

Then in 1885 was passed the Act 48 Vict. ch. 50 to consolidate and amend the High Schools Act. By section 4 it was enacted that "there shall be a high school or high schools in every county * * to be distinguished by prefixing to the words 'high school' * * the name of the city, town or village within the limits of which the high school * * is situated, but such high school shall nevertheless be deemed to be one of the high schools * * of the county, and within the municipal jurisdiction of the county council."

Section 11 of R. S. O. ch. 205, was re-enacted, so that with reference to section 4 the word "county" had, when necessary, to be read as "town," and the words "county council" as "town council."

In 1887, therefore, Port Arthur was a high school district, and the law was that there should be a high school therein, and it was the duty of the council to take steps to establish one.

Judgment.

Moss,
J.A.

The first step was the appointment of a board of trustees, and with the greatest deference to the opinion expressed by the late Chief Justice of the Common Pleas Division in *Dawson v. Town of Sault Ste Marie* (1889), 18 O. R. 556, I venture to think it was not necessary that the appointment of the board should have been by by-law.

There is nothing in the Act of 1885 expressly requiring the board to be appointed by by-law of the council. The act of appointing trustees is not done under the provisions of the Municipal Act.

The learned Chief Justice's attention does not appear to have been called to the opinion expressed by my brother Osler in *Township of Pembroke v. Canada Central R. W. Co.* (1882), 3 O. R. 503, at p. 508, that the section of the Municipal Act requiring the powers of the council to be exercised by by-law must be construed as referring to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes, or by another Legislature. My learned brother also pointed out that the councils may and constantly do express their intentions by resolution, and that it was one of the forms of corporate expression recognized in the Municipal Act.

Appointments of trustees are made every year, and from year to year, and there seems no special reason why the corporate action in such case should not be manifested in the form of a resolution.

Section 14 of the Act of 1885 provides that every high school board shall consist of six trustees, and that every trustee for the time being shall hold office until his successor be appointed, and section 17 provides that the council at its first meeting in January in each year is to appoint two trustees to fill the vacancies caused by the annual retirement of that number from the board.

Section 16 is important as shewing that when the Legislature intended the council to act by by-law it said so. The county council shall appoint a board of six trus-

Judgment.

Moss,
J.A.

tees, and shall "by by-law" determine their continuance and succession of office.

These provisions were in force when the plaintiffs' board was first appointed by the council of Port Arthur, and it appears from the minutes of the first meeting of the board that six trustees had been appointed. At present the number constituting the board is eight, under the provisions of the High Schools Act, 1896, 59 Vict. ch. 71, sec. 11, sub-secs. 5, 7 and 8 (O.), now R. S. O. ch. 293, sec. 12, sub-secs. 6 and 7.

But in other respects the provisions with regard to the appointment of trustees are substantially as they were in 1887.

We have the fact that the town of Port Arthur did pass by-laws for the building of the high school, and that a building was erected.

Then came the enactment of the High Schools Act 1891, 54 Vict. ch. 57, sec. 6 (O.), that all high school districts in existence on the passing of that Act shall remain as then constituted until changed by the municipal council, and (section 5) that all appointments, agreements, contracts * * duly made in relation to high schools in existence at the date of the passing of the Act, and all powers and duties connected therewith shall continue in full force and effect, subject to the provisions of the Act.

It thus appears that Port Arthur is a constituted high school district, and the plaintiffs are a duly and properly created board, which is a corporation by virtue of the provisions of the High School Acts, but if not, there is a town forming a high school district and a *de facto* board and school, and the language of the enactment under which this action is brought seems wide enough to include such a case.

Mr. Bell, for the defendants, contended that the liability of the town only arose in the case of pupils who attended the high school with the consent of the corporation. But there is nothing in the enactment to give colour to this contention.

It is obvious that the intention of the Legislature was to place a town in the situation of Fort William on the same footing as to liability for pupils attending a high school in another town as counties are, under the Act of 1896, for the maintenance of county pupils.

Judgment.

Moss,
J.A.

And everything has occurred in this case to give rise to the liability of the ratepayers of Fort William, represented by the defendants, to bear their proportion of the burden of maintaining this educational establishment.

It was also contended that the corporation was not rendered liable by the words of the enactment that "the municipal council shall pay for the maintenance," etc.

The expression, "the municipal council of every county * * shall pay for the maintenance of every high school," is used in sec. 31 of the High Schools Act, R. S. O. ch. 293, and may be traced back with slight variations through the corresponding sections to sec. 45 of the Act 37 Vict. ch. 27.

Similar phraseology carried forward from previous enactments is found in other Acts, and amongst others, in the Public Schools Act, R. S. O. ch. 292, sec. 82 (8), and sec. 90 (6), in the Municipal Act, R. S. O. ch. 223, sec. 437, and in the Ditches and Watercourses Act, R. S. O. ch. 285, secs. 20 and 30. But it has never been considered that the corporation of the municipality was not the proper body to pay, and it would certainly be a surprise to the framers of these Acts if they were told that they had made the members of the council, and not the corporation, liable to pay and to judgment against them in default of payment.

In each of these cases it is evident that the obligation is that of the corporation to be discharged by its executive, the council. And the same construction should be placed on the words in question here.

I think the judgment against the corporation should stand. But there does not appear any substantial ground for the mandamus.

Under the Municipal Act a writ of execution may issue

Judgment.
Moss,
J.A.

upon the judgment against the corporation, and the sheriff must proceed as directed by section 471, and if any rate is to be levied he is the proper person to take the necessary steps.

The cases cited of *School Trustees of Toronto v. City of Toronto* (1860), 20 U. C. R. 302, and *Clarke v. Township of Palmerston* (1883), 6 O. R. 616, do not support the claim in this case.

There the only present liability of the corporation was to levy a rate for the purpose of raising a fund to be thereafter used in paying a demand when it arose. The applicants were not asking, and were not in a position to ask, for judgment against the corporation for payment of any sum of money. And in the first case the mandamus sought and awarded was against the corporation, while in the second the application was against the corporation, and the only question as to parties was whether the application should not have been for a mandamus to the clerk of the municipality, instead of to the corporation. See judgment of Proudfoot J., at p. 620.

The action should be dismissed as against the individual defendants, but without costs.

The defendants, the corporation, must pay the costs of the appeal.

Appeal dismissed.

R. S. C.

APPENDIX.

Cases reported in the Ontario Appeal Reports, disposed of by the Judicial Committee of the Privy Council and by the Supreme Court of Canada since the publication of volume 24, up to December 31st, 1898.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

JOHNSTON V. CONSUMERS' GAS COMPANY OF TORONTO, 23 A. R. 566.—Appeal dismissed ; April 1st, 1898 : [1898] A. C. 447.

MOLSONS BANK V. COOPER, 23 A. R. 146 ; 26 S. C. R. 611.—Appeal dismissed ; March 9th, 1898.

IN RE TORONTO RAILWAY COMPANY ASSESSMENT, 25 A. R. 135.—Leave to appeal refused ; August 3rd, 1898. See also 27 S. C. R. 640.

SUPREME COURT OF CANADA.

ANDERSON V. GRAND TRUNK RAILWAY COMPANY, 24 A. R. 672.—Appeal allowed ; June 14th, 1898 : 28 S. C. R. 541.

BAIN V. ANDERSON, 24 A. R. 296.—Appeal dismissed ; May 14th, 1898 : 28 S. C. R. 481.

BARBER V. MCCUAIG, 24 A. R. 492.—Appeal allowed ; November 21st, 1898.

BOULTBEE V. GZOWSKI, 24 A. R. 502.—Appeal allowed ; October 13th, 1898.

BUILDING AND LOAN ASSOCIATION V. MACKENZIE, 24 A. R. 599.—Appeal dismissed; May 6th, 1898: 28 S. C. R. 407. Leave to appeal refused by the Judicial Committee, November 28th, 1898.

COUNTY OF CARLETON V. CITY OF OTTAWA, 24 A. R. 409.—Appeal dismissed; March 18th, 1898: 28 S. C. R. 606.

FISHER V. FISHER, 25 A. R. 108.—Leave to appeal refused; May 20th, 1898: 28 S. C. R. 494.

OSTROM V. SILLS, 24 A. R. 526.—Appeal dismissed; May 14th, 1898: 28 S. C. R. 485.

RAINVILLE V. GRAND TRUNK RAILWAY COMPANY, 25 A. R. 242.—Appeal dismissed; November 21st, 1898.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

COURT OF APPEAL FOR ONTARIO.

ACCELERATION CLAUSE.

See BANKRUPTCY AND INSOLVENCY, 3.

ACCOUNTS.

See IMPROVEMENTS.

ACTION.

Assault — Criminal Prosecution — Civil Remedy — Justice of the Peace — Alteration of Charge — Certificate.]—Justices of the peace, before whom a charge of “shooting and wounding with intent to do grievous bodily harm” came on for preliminary hearing, changed it of their own motion to one of common assault and convicted and fined the accused. The information was laid by a peace officer, and the person aggrieved attended the hearing pursuant to subpoena and gave evidence, and did not object when the charge was changed:—

Held, that the justices had no right to alter the charge to one of common assault, and that their certificate of conviction and payment of the fine was a nullity and no bar under section 866 of the Code to an

action by the person aggrieved to recover damages.

Judgment of a Divisional Court reversed. *Miller v. Lea*, 428.

See WATER AND WATERCOURSES.

AMENDMENT.

See STATUTES.

APPEAL.

See RAILWAYS, 2.

APPURTENANCES.

See DEED.

ARBITRATION AND AWARD.

Arbitrator — Refusal to State Case.]—When questions of law arise in the course of arbitration proceedings any party thereto may apply to the arbitrator under section 41 of the Arbitration Act, R. S. O. ch. 62, to state a case for the opinion of the Court, and in the event of

his refusal may apply to the Court to compel him to do so.

The application may be made before the arbitrator gives a ruling on the questions of law, and the making of an order is in each case a matter of judicial discretion, the order granting or refusing the direction to the arbitrator being subject to appeal.

On the merits the judgment of ROBERTSON, J., refusing to order the arbitrator to state a case, was affirmed. *In re Jenison and Kakebeka Falls Land and Electric Co.*, 361.

See DRAINAGE, 2—RAILWAYS, 2, 3.

ASSAULT.

See ACTION.

ASSESSMENT AND TAXES.

1. *Toronto Railway Company—Rails, Poles and Wires—Highways—Street Railway.*—The rails, poles and wires of the Toronto Railway Company, used by them in operating their electric railway, and laid and erected in and upon the public highways of the city of Toronto, are subject to assessment under the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.), BURTON, C. J. O., dissenting.

Toronto Street R. W. Co. v. Fleming (1875), 37 U. C. R. 116, has been overruled by *Consumers' Gas Co. v. Toronto* (1897), 27 S. C. R. 453. *In re Toronto R. W. Co. Assessment*, 135.

2. *Life Insurance Company—Reserve Fund—Income—Divisible Profits.*—The net interest and dividends received by the Canada Life Assurance Company from investments of their reserve fund form part of their taxable income, though to the extent of ninety per cent. thereof divisible, pursuant to the terms of the company's special Act, as profits among participating policy holders and not subject to the control or disposition of the company.

Judgment of the Board of County Judges affirmed. *In re The Canada Life Assurance Co. and The City of Hamilton*, 312.

3. *Telephone Company—Poles, Wires, Conduits and Cables.*—In assessing for purposes of taxation the poles, wires, conduits and cables of a telephone company, the cost of construction, or the value as part of a going concern, is not the test; they must be valued, in the assessment division in which they happen to be, just as materials which, if sold or taken in payment of a just debt from a solvent debtor, would have to be removed and taken away by the purchaser or creditor.

Judgment of the Board of County Judges reversed. *In re The Bell Telephone Co. and The City of Hamilton*, 351.

ASSIGNMENTS AND PREFERENCES.

See BANKRUPTCY AND INSOLVENCY.

BALANCE OF CONVENIENCE.

See INJUNCTION.

BANKRUPTCY AND INSOLVENCY.

1. *Assignments and Preferences—Contingent Claim — Advertising Contract*—*R. S. O. ch. 124, sec. 20, sub-sec. 4.*]—Where an estate is being administered under the Assignments and Preferences Act, *R. S. O. ch. 124*, claims depending upon a contingency cannot rank, but only debts strictly so called.

An advertising contract gave the advertiser in consideration of the sum of \$1,000 the right to use certain advertising space in a newspaper at any time within twelve months, the advertiser agreeing to pay at the end of each month for the space used in that month, and at the expiration of twelve months, whether the space had been used or not, to pay \$1,000 less such sums as might have in the meantime been paid. The advertiser before using any space, and before the expiration of twelve months, made an assignment for the benefit of creditors pursuant to *R. S. O. ch. 124* :—

Held, reversing the judgment of *Boyd, C.*, 28 O. R. 326, that the \$1,000 would not necessarily become due by effluxion of time, and that the newspaper company could not rank.

Grant v. West (1896), 23 A. R. 533, applied. *Mail Printing Co. v. Clarkson*, 1.

2. *Assignments and Preferences—Pressure—Agreement to Give Security.*]—Where a preferential security, given while *R. S. O.* (1887) *ch. 124*, as amended by 54 *Vict. ch. 20*, was in force, is attacked within sixty days, evidence of pressure is not admissible to rebut the presumption of intent to give a preference.

An agreement to give security,

made in good faith, may, even though it is indefinite in its terms, avail to rebut the presumption of intent to prefer, but where the giving of security is deliberately postponed in order to avoid injury to the debtor's credit, or to avoid the statutory presumption, the agreement to give the security is of no avail.

Judgment of *Armour, C.J.*, reversed, *Burton, C. J. O.*, dissenting. *Webster v. Crickmore*, 97.

3. *Assignments and Preferences—Landlord and Tenant—Rent—Acceleration Clause*—“*Current Quarter*”—58 *Vict. ch. 26, sec. 3, sub-sec. 1 (O.)*.]—By a lease made on the 31st of October, 1895, certain premises were demised for a term of three years from the 1st of November, 1895, at a yearly rent of \$480, payable, in advance, in even portions monthly on the first day of each month, the first payment to be made on the 1st of November, 1895. The lease contained the usual statutory covenants and provisoes, and an express power of entry and distress for rent in arrear, and also the following provision :—“If the lessee shall make any assignment for the benefit of creditors * * the then current quarter's rent shall immediately become due and payable.” On the 31st of January, 1896, the lessor, who also held a chattel mortgage on the goods on the demised premises as collateral security for the payment of certain indebtedness of the lessees, took possession both as mortgagee and by way of distress for rent in arrear, only \$40 having up to that time been paid to her on account of rent. On the same day the lessees made an assignment for the benefit of creditors and by consent the goods on the demised premises, which were of far more value than \$200,

were sold by the lessor and were removed from the demised premises before the last day of February. The lessor retained out of the proceeds of the goods \$200, rent for December, 1895, and January, February, March and April, 1896 :—

Held, per BURTON, C.J.O., and MACLENNAN, J.A.—That sub-sec. 1 of sec. 3 of 58 Vict. ch. 26 (O.), now R. S. O. ch. 170, sec. 34, sub-sec. 1, is a restrictive provision, and limits the landlord's lien even though in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provision, and that it does not give to the landlord an absolute right to three months' rent upon an assignment for the benefit of creditors being made.

Clarke v. Reid (1896), 27 O. R. 618, disapproved.

Per BURTON, C.J.O.—That the acceleration clause in the lease in question had no application, though even if the words "current quarter" could be read "current three months" the clause would not help the lessor, as the current three months ended on the 31st of January, 1896; but that a lessor apart from an acceleration clause is entitled to the rent, not exceeding three months' rent in advance, which becomes in arrear while the assignee remains in possession and while there are sufficient goods on the demised premises subject to distress, so that in this case the lessor was entitled to the rent which fell due on the 1st of February, 1896.

Per OSLER, J.A.—That the acceleration clause in the lease had no application, but that if it had, then a quarter's rent became in arrear under it within three months after the assignment for the benefit of creditors and while the assignee was

in possession and there were sufficient goods upon the demised premises subject to distress, so that the lessor would be entitled to the amount claimed; but that apart from an acceleration clause a lessor is entitled to the rent which becomes in arrear subsequent to the assignment and for three months thereafter, whether there are goods subject to distress or not, so that in this case the lessor was entitled to the rent which fell due on the 1st of February, 1st of March, and 1st of April, 1896.

Per MACLENNAN, J.A. — That "current quarter" in the acceleration clause meant a quarter of a year, or three months, but that the clause did not avail in this case because the current three months ended on the 1st of February, 1896; but that a lessor, apart from an acceleration clause, is entitled to the rent, not exceeding three months' rent in advance, which becomes in arrear while the assignee remains in possession and while there are sufficient goods on the demised premises subject to distress, so that in this case the lessor was entitled to the rent which fell due on the 1st of February, 1896.

In the result the judgment of FALCONBRIDGE, J., allowing the lessor rent for the months of February, March, and April, was varied by disallowing rent for March and April. *Langley v. Meir*, 372.

See Gignac v. Iler, 393.

BENEFICIARY.

See BENEVOLENT SOCIETY.

BENEVOLENT SOCIETY.

1. *Insurance—Life Insurance—Mistake as to Age*—52 Vict. ch. 32, sec. 6 (O.).]—Section 6 of the Ontario Insurance Amendment Act, 1889, 52 Vict. ch. 32 (O.), does not apply to benevolent societies having an age limit for admission to membership, and where a man who was older than the age limited was, owing to his innocent misrepresentation as to his age, admitted as a member and given an endowment certificate, it was held that the beneficiary named therein could not recover.

Judgment of STREET, J., 28 O. R. 111, reversed, MACLENNAN, J.A., dissenting. *Cerri v. Ancient Order of Foresters*, 22.

2. *Certificate—Change in Rules.*]—A certificate issued by a benevolent society providing for payment of the endowment to the member's "next of kin," and expressed to be subject to the constitution and by-laws of the society then in force and also to such amendments and alterations as might thereafter be regularly adopted, is not affected by a subsequent change of the rules of the society omitting "next of kin" by that name from the classes of persons to whom certificates may be made payable.

Judgment of MACMAHON, J., affirmed. *Yelland v. Yelland*, 91.

3. *Life Insurance—Construction of Certificate—Designation of Beneficiary—Insurance for Benefit of Wife*—R. S. O. (1887) ch. 136.]—An application for a benevolent society's certificate stated that the insurance money was to be paid to the applicant's wife, and the certificate as issued and accepted pro-

vided that the money should, upon the death of the member, be paid to his wife, or such other beneficiary or beneficiaries as he might in his lifetime have designated in writing indorsed on the certificate, and in default of any such designation to his legal personal representatives:—

Held, OSLER, J.A., dissenting, that the certificate came within the Act to secure to wives and children the benefit of life assurance, R. S. O. (1887) ch. 136, and that the wife's interest was not affected by an absolute assignment, endorsed upon it, by the assured to a creditor.

Judgment of STREET, J., 28 O. R. 459, reversed. *Fisher v. Fisher*, 108.

See INSURANCE.

BOND.

See PRINCIPAL AND SURETY.

BY-LAWS.

See INJUNCTION.

CASES.

Baldwin v. Kingstone (1890), 18 A. R. 63, distinguished.]—See WILL, 2.

Re Birely and Toronto, Hamilton and Buffalo R. W. Co. (1897), 28 O. R. 468, considered.]—See RAILWAYS, 3.

Castor v. Uxbridge (1876), 39 U. C. R. 113, referred to.]—See MUNICIPAL CORPORATIONS, 1.

Clarke v. Reid (1896), 27 O. R. 618, disapproved.]—See BANKRUPTCY AND INSOLVENCY, 3.

Consumers' Gas Co. v. Toronto (1897), 27 S. C. R. 453, considered.]
—See ASSESSMENT AND TAXES, 1.

Dawson v. Town of Sault Ste. Marie (1889), 18 O. R. 556, considered.]—See SCHOOLS.

Ellice v. Hiles (1894), 23 S. C. R. 429, considered and distinguished.]
—See DRAINAGE, 2.

Grant v. West (1896), 23 A. R. 533, applied.]—See BANKRUPTCY AND INSOLVENCY, 1.

Maxwell v. Clarke (1879), 4 A. R. 460, referred to.]—See MUNICIPAL CORPORATIONS, 1.

Nevitt v. McMurray (1886), 14 A. R. 126, applied.]—See REGISTRY LAW.

Ruleigh v. Williams, [1893] A. C. 540, at p. 550, applied.]—See DRAINAGE, 3.

Seymour v. Township of Maidstone (1897), 24 A. R. 370, distinguished.]
—See MUNICIPAL CORPORATIONS, 2.

Toms v. Whitby (1875), 37 U. C. R. 100, referred to.]—See MUNICIPAL CORPORATIONS, 1.

Toronto Street R. W. Co. v. Fleming (1875), 37 U. C. R. 116, considered.]
—See ASSESSMENT AND TAXES, 1.

Township of Pembroke v. Canada Central R. W. Co. (1882), 3 O. R. 503, considered.]—See SCHOOLS.

Tylee v Deal (1873), 19 Gr. 601, distinguished.]—See WILL, 2.

Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, followed.]—See RAILWAYS, 6.

Willis v. Watney (1881), 51 L. J. Ch. 181; 30 W. R. 424; 45 L. T. N. S. 739, distinguished.]—See DEED.

Re Wilson and Ingersoll (1894), 25 O. R. 439, referred to.]—See JUNCTION.

York v. Township of Osgoode (1892), 24 O. R. 12; (1894), 21 A. R. 168; (1895), 24 S. C. R. 282, distinguished.]—See DITCHES AND WATERCOURSES ACT.

CERTIFICATE.

See ACTION—BENEVOLENT SOCIETY.

CHANGE IN LAW.

See WILL, 2.

CHANGE IN RULES.

See BENEVOLENT SOCIETY, 2.

CHARITABLE DEVISE.

See WILL, 1.

CHOSE IN ACTION.

See CONTRACT.

CHURCH.

Incumbent's Salary—Liability of Churchwardens.]—The churchwardens of an Anglican congregation which has adopted the free seat system, and in which the only revenue is derived from the volun-

tary contributions of the members, are not liable to the incumbent for the payment of his salary except to the extent of contributions received by them for that purpose.

Judgment of *BOYD, C.*, 28 O. R. 452, affirmed. *Daw v. Ackerill*, 37.

CHURCHWARDENS.

See CHURCH.

CIVIL REMEDY.

See ACTION.

COMMON EMPLOYMENT.

See RAILWAYS, 5.

COMPANY.

Contract with Trading Corporation—Absence of Seal—Manager's Authority—Purchase in Ordinary Course of Business.—The defendants, by resolution of the board of directors, authorized their manager to purchase from the plaintiff, on certain terms of credit, a machine necessary for the carrying on of the defendants' business. The defendants' manager bought the machine, but on different terms, the plaintiff having no knowledge of the board's resolution; and the defendants received and used the machine:—

Held, that the purchase was within the scope of the manager's authority, and that the defendants were liable for the price of the machine.

Judgment of *MEREDITH, J.*, reversed in part. *Thompson v. The Brantford Electric and Operating Company (Limited)*, 340.

CONDITION.

See INSURANCE, 2.

CONSIDERATION.

See GIGNAC *v.* ILER, 393.

CONSTITUTIONAL LAW.

See RAILWAYS, 1, 5.

CONTINGENT CLAIM.

See BANKRUPTCY AND INSOLVENCY, 1.

CONTRACT.

Partnership—Chose in Action—Assignment of — Counterclaim — Novation.—A firm which had contracted with respondents to supply them with a number of bicycles, was subsequently dissolved, one partner retiring, and a new partner taking his place. The notice of dissolution stated that the business would be carried on by the new firm, who would pay the indebtedness of the old, and who were alone authorized to collect its debts, and by the agreement for dissolution, the partners released each other from all liability, and it was agreed that all the claims of the old firm belonged to and would be collected by the new. The respondents had a large claim for damages against the old firm for non-fulfilment of contract, and upon learning from appellants the facts as to the dissolution, made claim against the new firm:—

Held, upon the correspondence set out in the judgment of *ROSE, J.*, that novation had taken place and

that the respondents were entitled to claim against the appellants the damages which the former had sustained through breach of the contracts, but that such damages must be limited to those arising from breaches occurring prior to the dissolution.

Judgment of ARMOUR, C.J., 27 O. R. 631, varied. *Seyfang v. Mann*, 179.

See COMPANY — NEGLIGENCE — STREET RAILWAYS—*Hesselbacher v. Ballantyne*, 36.

CONTRIBUTION.

See PRINCIPAL AND SURETY, 1.

COUNTERCLAIM.

See CONTRACT.

CROSSINGS.

See RAILWAYS, 1, 6.

DAMAGES.

See DRAINAGE — MASTER AND SERVANT — MUNICIPAL CORPORATIONS. 2 — NEGLIGENCE — RAILWAYS, 3, 5, 6.

DEED.

Description — Appurtenances — R. S. O. (1877) ch. 102, sec. 4.]—Where in a conveyance made in pursuance of the Short Forms of Conveyances Act, R. S. O. (1877) ch. 102, a parcel of land is accurately described by metes and bounds, the general

words of sec. 4 will not pass lands with buildings thereon not embraced in the specific description, merely because the buildings were previously used, occupied and enjoyed with the property specifically described by metes and bounds.

Willis v. Watney (1881), 51 L. J. Ch. 181, 30 W. R. 424, 45 L. T. N. S. 739, distinguished.

Judgment of ARMOUR, C. J., affirmed. *Hill v. Broadbent*, 159.

DEFECT.

See NEGLIGENCE.

DESCRIPTION.

See DEED.

DEVOLUTION OF ESTATES ACT.

Dower — Election — R. S. O. ch. 127, sec. 4.]—Where in the administration by the Court of the estate of an intestate lands have been sold and the purchase money paid into Court and not distributed, the widow may, although more than twelve months have elapsed since the death of her husband, elect to take in lieu of dower her distributive share under the Devolution of Estates Act.

Judgment of BOYD, C., 29 O. R. 388, affirmed. *Baker v. Stuart*, 445.

DITCHES AND WATERCOURSES ACT.

57 Vict. ch. 55 (O.) — Owner — Appeal from Award — Trustees — Service of Notices — Deepening Ditch — Water and Watercourses.]—*Per* OSLER and MOSS, J.J.A., BURTON,

C.J.O., contra.—Where in proceedings under the Ditches and Watercourses Act, 57 Vict. ch. 55 (O.), a declaration of ownership has been made and filed by the person initiating the proceedings, any objection to his status as owner should be made before confirmation of the award; the effect of section 24 being that the award when made and confirmed by lapse of time or on appeal cannot be impeached on such a ground.

York v. Township of Osgoode (1892), 24 O. R. 12; (1894), 21 A. R. 168; (1895), 24 S. C. R. 282, distinguished.

Per BURTON, C.J.O., and MOSS, J.A., MACLENNAN, J.A., contra.—A person in possession of land under a lease with an option to purchase, no default having occurred, is not the owner of the land within the meaning of the Ditches and Watercourses Act, 57 Vict. ch. 55 (O.), and is not entitled to initiate proceedings thereunder.

Per OSLER, MACLENNAN, and MOSS, J.J.A.—Where land affected by a proposed work is vested in several persons as devisees in trust, none of them living upon the land, or in the municipality in which the land is situate, service of notice of proceedings under the Ditches and Watercourses Act upon one of them for all is sufficient; at any rate sections 23 and 24 cure any objection as to sufficiency of service.

Per OSLER, MACLENNAN, and MOSS, J.J.A.—Section 36 of the Act applies where a ditch has been completed and a new arrangement is necessary in regard to its maintenance; it does not apply where a ditch is being deepened or extended and for work of that kind the two years' limitation is not in force.

In the result the judgment of ARMOUR, C.J., at the trial was

reversed, BURTON, C.J.O., dissenting. *Township of Logan v. Township of McKillop*, 498.

DOWER.

See DEVOLUTION OF ESTATES ACT.

DRAINAGE.

1. *Repairs to Drain* — “*Person Injuriouly Affected*”—*Mandamus*—*Drainage Act, 1894*—57 Vict. ch. 56, sec. 73 (O.).]—Under section 73 of The Drainage Act, 1894, [57 Vict. ch. 56 (O.)] a ratepayer whose property has been assessed for the maintenance and repair of a drain, as deriving benefit from it, is a person injuriouly affected by its want of repair, even though he has not suffered any pecuniary loss or damage by reason thereof, and he may be awarded a mandamus to compel the municipality, whose duty it is to keep the drain in repair, to do such work as may be necessary, unless the municipality can shew that, even if the drain were repaired, it would, from changes in the surrounding conditions, be useless to the applicant's property.

Judgment of the Drainage Referee reversed in part. *Stephens v. Township of Moore*, 42.

2. *Land Injuriouly Affected* — *Appeal to Court of Revision*—*Claim for Damages*—*Sufficiency of Notice* — *Filing Notice* — *Arbitration*.]—Under the drainage clauses of the Municipal Act of 1892, a landowner who is injuriouly affected by a drainage work and who is assessed for part of the cost is not bound to appeal to the Court of Revision for the allowance to him of damages to

be set-off against his assessment ; he has his remedy by arbitration or action.

Ellice v. Hiles (1894), 23 S. C. R. 429, considered and distinguished.

Whether such a claim is made by application for arbitration or by action is immaterial ; in either event the Drainage Referee has jurisdiction to deal with it.

The provision of sub-section 3 of section 93 of the Drainage Act, 1894, requiring a copy of the notice of claim to be filed with the County Court Clerk is directory and not imperative, and recovery is not barred where notice of the claim is duly given to the municipality and an action commenced within the time limited but a copy of the notice is not filed.

A notice that the claim is for damages sustained "by reason of the enlargement and construction" of the drain in question is sufficient to support a claim for damages for interference, because of the drain, with access to part of the claimant's farm.

Judgment of the Drainage Referee affirmed. *Thackery v. Township of Raleigh*, 226.

3. *Invalid By-law — Damages — Charging Assessed Area.*—The municipal council of a township passed a provisional by-law for the construction of drainage works affecting land in three townships, in accordance with the assessment, specifications and estimates contained in the report, upon petition, theretofore made by their engineer. On the matter coming up before the Court of Revision it was found that the petition had not been signed by the necessary number of owners. The council then, without any new petition or engineer's report, altered the report already made, reducing the size and

cost of the work, changing the specifications, estimates and assessments accordingly, and passed a by-law for the construction of the works, as in the altered report, in the three townships :—

Held, that this by-law was void.

Raleigh v. Williams, [1893] A. C. 540, at p. 550, applied.

Where a by-law for the construction of drainage works is void, damages awarded to a landowner on account of injury to his crops caused by the negligent construction of the work are not to be charged against the drainage area assessed for the work, but are chargeable against the initiating municipality.

Judgment of the Drainage Referee reversed in part. *McCulloch v. Township of Caledonia*, 417.

EASEMENT.

Right of Way — Prescription — Landlord and Tenant—Acknowledgment by Tenant.—After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription the tenant of the dominant tenement, without the knowledge of the owner, gave to the tenant of the servient tenement two pairs of shoes as consideration for the exercise of the right :—

Held, that even if an act of this kind could in any event affect the right that had been acquired the owner of the dominant tenement was not bound by what the tenant did without his authority.

Judgment of ROSE, J., affirmed. *Ker v. Little*, 387.

ELECTION.

See DEVOLUTION OF ESTATES ACT.

ESTOPPEL.

See REGISTRY LAW.

EVIDENCE.

See Kervin v. Canadian Coloured Cotton Mills Company, 36.

EXECUTORS AND ADMINISTRATORS.

See RAILWAYS, 5.

EXPROPRIATION.

See RAILWAYS, 2, 3.

EXTRADITION.

Offence Referred to by Wrong Name—Theft—Larceny.]—Where there is evidence of the commission of an act which is recognized as a crime by the law of Canada and the law of the country demanding the extradition of the accused person, extradition will lie, though in the proceedings therefor the offence is referred to by a wrong name.

Larceny is, by the Ashburton Treaty, the Convention of 1889, and the Extradition Act, specified as a crime for which extradition to the United States will lie, but larceny is not, by that name, recognized as a crime by the Criminal Code, 1892, the terms there used to describe the same offence being "theft" or "stealing":—

Held, affirming the judgment of ROSE, J., that where there was evidence of the commission of the crime of theft the prisoner should be held for extradition, although in

the proceedings for extradition the offence was described as larceny. *In re Gross*, 83.

FIRE.

See RAILWAYS, 4.

FIRE DEPARTMENT.

See MUNICIPAL CORPORATIONS, 2.

FIXTURES.

Mortgagor and Mortgagee—Wooden Building.]—A small building of thin board, lathed and plastered inside, and divided into three rooms, resting by its own weight on loose bricks laid on the soil, built for and used at first as a booth or shop and then for a time as a dwelling house, was held to be a fixture in an action by the mortgagee of the land, although the building was placed on the land, after the mortgage was made, by the mortgagor's husband who swore that it was placed on the land without any intention of leaving it there permanently.

Judgment of a Divisional Court, 29 O. R. 21, reversed. *Miles v. Ankatell*, 458.

FRAUDULENT CONVEYANCE.

See Gignac v. Her, 393.

HIGHWAYS.

See ASSESSMENT AND TAXES, 1—MUNICIPAL CORPORATIONS, 1—RAILWAYS, 1, 3, 6.

HIGH SCHOOLS.

See SCHOOLS.

HIRE OF CHATTELS.

See NEGLIGENCE.

HUSBAND AND WIFE.

See BENEVOLENT SOCIETY, 3.

IMPROVEMENTS.

Tenants in Common—Allowances—Interest—Practice—Master's Office—Accounts.]—A tenant in common who holds possession of, manages, and receives the rent of, the common property, which is subject to an encumbrance, is entitled when called on for an account by his co-tenant, to be allowed for advances properly and reasonably made by him, for repairs and improvements, and for principal and interest on the encumbrance, with interest from the time the advances are made.

The mode of taking the account and computing interest discussed.

Judgment of STREET, J., affirmed.

Where accounts are brought into the Master's office by the accounting party, with the vouchers and the usual affidavit of verification, and no notice of objection is given, the accounts are taken to be sufficiently proved.

Judgment of STREET, J., 17 P. R. 379, affirmed. *In re Curry, Curry v. Curry*. *Curry v. Curry*, 267.

INCOME.

See ASSESSMENT AND TAXES, 2.

INJUNCTION.

Interlocutory Order—Balance of Convenience—Municipal Corporations—By-laws Regulating Procedure.]—A by-law of a municipal corporation, passed under section 283 of the Consolidated Municipal Act, for the purpose of regulating procedure, requiring work exceeding \$200 in value to be done by contract after tenders had been called for, was, on the acceptance of duly advertised for tenders for the construction of a pavement on a particular street, disregarded by the council stipulating in accepting the tenders that the contract should be held to cover and include the construction during the year of any similar pavement on other streets at the same prices and terms. In pursuance of this stipulation, the contractors entered into other contracts with the corporation, and proceeded with the work by opening up other streets and otherwise, when they were enjoined from proceeding by an interlocutory order in an action by a ratepayer:—

Held, that as the applicant's legal right was not clear, and as serious loss and public inconvenience would necessarily result from granting the order, while no irreparable loss would result from refusing it, the interlocutory injunction should not have been granted.

Validity of proceedings not taken in accordance with the provisions of a by-law for regulating the proceedings of the council or committee thereof, considered.

Re Wilson and Ingersoll (1894), 25 O. R. 439, referred to.

Judgment of ROBERTSON, J., reversed. *Dwyre v. Ottawa*, 121.

See STREET RAILWAYS.

INSURANCE.

1. *Life Insurance — Benevolent Society*—“*Renewed Contract*”—55 Vict. ch. 39, sec. 33 (O.).]—It is not a renewal of a contract of insurance within the meaning of sec. 33 of the Insurance Corporations Act, 1892, [55 Vict. ch. 39 (O.)] but a continuance of the original contract, when after default in payment of assessments and consequent suspension of rights, a member of a benevolent society pursuant to the rules of the society, pays the assessments as of right and becomes thereby *ipso facto* reinstated.

Judgment of ARMOUR, C. J., reversed. *Long v. The Ancient Order of United Workmen*, 147.

2. *Marine Insurance — Vessel — Construction of Policy—Condition.*]—The defendants insured a vessel for a stated period, “whilst running on the inland lakes, rivers and canals during the season of navigation, to be laid up in a place of safety during winter months from any extra hazardous building.” At the time of the issue of the policy the vessel was at a dock in inland waters and remained there unused, though at all times in condition to be used, for more than two years, when she was destroyed by fire, the policy having been kept in force:—

Held, per BURTON, C.J.O., and OSLER, J.A., that the risk did not attach, the meaning of the policy being that the vessel was insured during the season of navigation only while in commission:—

Held, per MACLENNAN, and MOSS, J.J.A., that the phrase in question was used merely to limit the risk geographically and that the risk did attach.

Whether the words in question

were descriptive of the risk, or a condition limiting the contract, considered.

In the result the judgment of ARMOUR, C.J., in favour of the plaintiffs was affirmed. *Great Northern Transit Co. v. Alliance Insurance Co.*, 393.

See BENEVOLENT SOCIETY.

INTEREST.

See IMPROVEMENTS.

JUSTICE OF THE PEACE.

See ACTION.

LAND INJURIOUSLY AFFECTED.

See DRAINAGE, 1, 2—RAILWAYS, 2, 3.

LANDLORD AND TENANT.

See BANKRUPTCY AND INSOLVENCY, 3—EASEMENT.

LARCENY.

See EXTRADITION.

LIEN.

Vendor's Lien—Performance of Agreement.]—In the absence of agreement or circumstances operating to the contrary a vendor's lien arises whenever land is conveyed in consideration of acts to be done by the grantee; the right is not limited

to cases of conveyance for a money consideration.

Where, therefore, upon the partition of a piece of land held by tenants in common, one grantee, as part of the consideration for his grant, covenanted to obtain for the other tenants in common a release of the contingent interest of two persons in the land conveyed to them, it was held that a lien attached upon the portion conveyed to him for the due performance of this covenant.

Judgment of ROBERTSON, J., affirmed. *Ward v. Wilbur*, 262.

See SHIP.

LIFE INSURANCE.

See ASSESSMENT AND TAXES, 2—
BENEVOLENT SOCIETY—INSURANCE.

LIMITATION OF ACTIONS.

See STATUTES.

MALICIOUS PROSECUTION.

Reasonable and Probable Cause—Advice of Counsel.—That the prosecution in question was instituted on the advice of counsel is not sufficient to protect the prosecutor if he does not exercise reasonable care to ascertain and lay before counsel the facts in reference to the alleged offence.

Absence of reasonable and probable cause for the prosecution is not by itself sufficient to impose liability; malice must exist, and the question of malice must be left to the jury.

Judgment of FERGUSON, J., reversed. *St. Denis v. Shoultz*, 131.

MANDAMUS.

See DRAINAGE, 1—SCHOOLS—
STREET RAILWAYS.

MARINE INSURANCE.

See INSURANCE.

MASTER AND SERVANT.

Damages—Tort—Wrongful Act of Servant—Scope of Employment.—A master is not liable for the wrongful act of a servant, though intended to promote the master's interest, if it is an act outside the scope of the servant's employment and authority, and is one which the master himself could not legally do.

The defendants were held not liable where the motorman of one of their electric cars, who had no control over or authority to interfere with passengers or persons on the cars, pushed off the car, as the jury found, a newsboy who was getting on to sell a paper to a passenger.

Judgment of ROBERTSON, J., reversed. *Coll v. Toronto Railway Company*, 55.

See RAILWAYS, 5—*Kervin v. Canadian Coloured Cotton Mills Company*, 36.

MASTER'S OFFICE.

See IMPROVEMENTS.

MENTAL SHOCK.

See RAILWAYS, 6.

MERCHANT SHIPPING ACT.*See* SHIP.**MORTGAGE.***See* FIXTURES—REGISTRY LAW.**MUNICIPAL CORPORATIONS.**

1. *Highways — Obstruction — Notice.*]—A house which was being moved from one part of a town to another was allowed to stand over night upon one of the streets without a watchman or warning light. The horses attached to a carriage in which the plaintiff was, while being driven past the house that night, took fright and the plaintiff was injured. Some of the town councillors knew that the house was being moved and two of them knew that it had been left standing upon the street for the night:—

Held, that, assuming that the house was an obstruction to the highway, there was not sufficient notice or sufficient lapse of time to impose liability upon the corporation.

Castor v. Uxbridge (1876), 39 U. C. R. 113; *Toms v. Whitby* (1875), 37 U. C. R. 100; and *Maxwell v. Clarke* (1879), 4 A. R. 460, referred to.

Judgment of *Boyd, C.*, 28 O. R. 598, reversed. *Rice v. Town of Whitby*, 191.

2. *Fire Department—Negligence—Damages.*]—Though municipal corporations are not bound by law to establish and manage a fire department, yet if they do so they are liable for injuries caused by the negligence of the servants employed

by them therein while in the performance of their duties.

Seymour v. Township of Maidstone (1897), 24 A. R. 370, distinguished.

Judgment of *ARMOUR, C. J.*, affirmed. *Hesketh v. The City of Toronto*, 449.

See INJUNCTION—PRINCIPAL AND SURETY, 2—SCHOOLS.

NAVIGATION.*See* WATER AND WATERCOURSES.**NEGLIGENCE.**

Hire of Chattels—Contract—Sub-contract — Defect — Damages.]—A contractor who, pursuant to the terms of a sub-contract, supplies to a sub-contractor a machine for use in the work, is not liable in damages to one of the sub-contractor's workmen for injuries sustained by reason of a patent defect in the machine, which has been accepted and used by the sub-contractor without objection.

Judgment of *FALCONBRIDGE, J.*, reversed. *Smith v. Onderdonk*, 171.

See MUNICIPAL CORPORATIONS, 2—RAILWAYS, 4, 5, 6. *Kervin v. Canadian Coloured Cotton Mills Company*, 36.

NEW TRIAL.*See* RAILWAYS, 5.**NOTICE.**

See DRAINAGE, 2—MUNICIPAL CORPORATIONS, 1—SHIP.

NOVATION.

See CONTRACT.

OBSTRUCTION.

See MUNICIPAL CORPORATIONS, 1.

OMISSION OF STATUTORY DUTY.

See RAILWAYS, 5, 6.

ONUS OF PROOF.

See *Gignac v. Iler*, 393.

PARTNERSHIP.

See CONTRACT.

PRACTICE.

See IMPROVEMENTS.

PRESCRIPTION.

See EASEMENT.

PRESSURE.

2. See BANKRUPTCY AND INSOLVENCY,

PRIMOGENITURE.

See WILL, 2.

PRINCIPAL AND SURETY.

1. *Counter Security — Right to Enforce — Depreciation — Contribution.*]—Where the principal debtor gives to his sureties counter-security by mortgage of real estate, any of the sureties is entitled, after the principal debtor's default, to enforce the security without the consent or concurrence of the others, and it is not an answer to a claim for contribution by one surety who has paid the whole debt that the security has depreciated in value and that the paying surety has refused to take any steps to enforce it.

Judgment of STREET, J., 28 O. R. 35, affirmed. *Moorhouse v. Kidd*, 221.

2. *Bond—Municipal Treasurer—Audit—Representations.*]—The treasurer of a county for a number of years embezzled county funds and by manipulation of his books deceived the county auditors who from year to year reported in good faith that his accounts were correct, and the council in good faith adopted the reports. While in fact in default to a large amount, the defendant, who was a ratepayer resident in the county and a relative of the treasurer, became at his request one of his sureties, and at the time was told in good faith by a member of the council and some of the county officials that the treasurer's accounts were correct :—

Held, that the auditors' reports so adopted by the council were not implied representations by the council, the incorrectness of which discharged the defendant.

Held, also, that the statements made by the member of the council and the county officials did not bind the council, and that even if they

did, having been made in good faith, they formed no defence.

Judgment of ARMOUR, C.J., reversed. *County of Simcoe v. Burton*, 478.

PRIORITIES.

See REGISTRY LAW.

RAILWAYS.

1. *Highways—Crossings—Maintenance of Gates—Apportionment of Cost—Constitutional Law—Railway Committee—Railway Act, 1888—51 Vict. ch. 29, secs. 11, 187, 188.*—The Railway Committee of the Privy Council, on the application of the city of Toronto, ordered the Canadian Pacific Railway Company to put up gates and keep a watchman where the line of railway crossed a highway running from the city of Toronto into the township of York, the line of railway being at the place in question the boundary between the two municipalities, and ordered the cost of maintenance to be paid in equal proportions by the railway company, and the city.

On a subsequent application by the city representing that the township was equally interested and asking for contribution from the township, the township brought in the county, and an order was made by the Railway Committee that the county and township should contribute in certain proportions:—

Held, per BURTON, C.J.O., and MACLENNAN, J.A.: That, assuming the validity of legislation conferring jurisdiction on the Railway Committee, their powers were limited to persons or municipalities invoking the exercise of their jurisdiction, and

that their order was invalid so far as it imposed a burden upon the township and county.

Per OSLER, J.A.: That the legislation was *intra vires*, and that the township and county were persons interested within the meaning of the Act, and subject to the jurisdiction of the Railway Committee.

Per MEREDITH, J.: That the legislation was *intra vires*, but that the county was not a person interested, not being under any responsibility for the maintenance of the highway in question.

Per Curiam: That the decision of the Railway Committee upon a subject, and in respect of persons, within its jurisdiction, cannot be reviewed or interfered with by the Court.

In the result an appeal from the judgment of ROSE, J., 27 O. R. 559, was allowed as to the county of York, and dismissed as to the township of York. *In re Canadian Pacific Railway Company and County and Township of York*, 65.

2. *Expropriation—Award—Appeal—51 Vict. ch. 29, sec. 161 (D.).*—Under section 161 of the Dominion Railway Act, 51 Vict. ch. 29 (D.), an appeal lies in this Province by either party from an award of compensation exceeding \$400 either to the Court of Appeal or to the High Court of Justice, but if an appeal is taken to the latter tribunal, no further appeal lies by either party to the Court of Appeal. *Birely v. Toronto, Hamilton and Buffalo R. W. Co.*, 88.

3. *Lands Injurious Affected—Operation of the Railway—Dominion Railway Act, 51 Vict. ch. 29.*—Under the Dominion Railway Act, 51 Vict. ch. 29, compensation recov-

erable in respect of lands injuriously affected must be based on injury or damage to the land itself and not on personal inconvenience or discomfort to the owner or occupant.

It was held, therefore, that no compensation could be allowed to the owner of land fronting on a street along which a railway company lawfully constructed its line of railway, there being no interference with access to the land except so far as that resulted from the passing of trains.

Re Birely and Toronto, Hamilton and Buffalo R. W. Co. (1897), 28 O. R. 468, considered.

Judgment of FALCONBRIDGE, J., affirmed. *Powell v. Toronto, Hamilton and Buffalo R. W. Co.*, 209.

4. *Fire — Negligence — Cutting Down Weeds.*]—A railway company is responsible for damages caused by fire which is started by sparks from one of their engines, in dead grass and shrubs allowed by them to accumulate in the usual course of nature from year to year on their land adjoining the railway track. It is the company's duty in such a case to remove the dangerous accumulation.

Judgment of FERGUSON, J., affirmed. *Rainville v. Grand Trunk R. W. Co.*, 242.

5. *Omission of Statutory Duty—Dominion Railway Act, 51 Vict. ch. 29, sec. 289—Constitutional Law—Workmen's Compensation for Injuries Act—Master and Servant—Common Employment—Negligence of Fellow Servant—Executors and Administrators—Damages—R. S. O. ch. 166—Reduction of Damages—New Trial.*]—Section 289 of the Dominion Railway Act, 51 Vict. ch. 29, giving to any person injured by the failure to observe any of the provi-

sions of the Act a right of action "for the full amount of damages sustained" is *intra vires*, and the limitation of amount mentioned in the Workmen's Compensation for Injuries Act does not apply to an action by a workman or his representatives under this section.

Where a statutory direction imposed upon an employer has not been observed it is no defence that its non-observance is due to the negligence of a fellow servant of the person injured.

The widow and child of a person killed in consequence of the defendants' negligence may, when letters of administration to his estate have not been issued, bring an action under R. S. O. ch. 166, without waiting six months.

Judgment of ROBERTSON, J., affirmed.

The Court thinking that the damages awarded by the jury in an action for causing death were excessive ordered that there should be a new trial unless the plaintiffs accepted a reduced amount. *Curran v. Grand Trunk R. W. Co.*, 407.

6. *Highway Crossing—Statutory Warning—Damages—Mental Shock.*]—The statutory warning required to be given where a line of railway crosses a highway on the level is for the benefit, not only of persons crossing the line of railway, but also of persons lawfully using the highway and approaching the line of railway.

Where, therefore, owing to the failure of the defendants to give the statutory warning, or any equivalent warning, the plaintiff drove close to their line of railway and his horses were frightened by a passing engine and injury resulted, he was entitled to recover.

Damages for "mental shock" are not recoverable.

Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, followed.

Judgment of *MACMAHON, J.*, affirmed. *Henderson v. Canada Atlantic R. W. Co.*, 437.

RAILWAY COMMITTEE.

See RAILWAYS, 1.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

REGISTRY LAW.

Priorities—Mortgage for Balance of Purchase Money—Estoppel.]

The plaintiff agreed to sell a parcel of land, one-half of the purchase money to be paid in cash and the other half to be secured by a mortgage thereon. A deed and mortgage were prepared and executed, the cash payment made, and the deed delivered to the purchaser, the mortgage being delivered to the vendor's agent to be registered. The purchaser had obtained a loan of the cash payment from the defendant upon the security of a first mortgage to be given upon the land in question and this mortgage was prepared, executed and delivered before the execution and delivery of the deed and was registered before the deed to the purchaser and before the mortgage to the plaintiff. Upon receiving the deed the purchaser handed it to the defendant's agent, who then registered it, the plaintiff's mortgage having in the meantime

been also registered. The plaintiff and the defendant acted in good faith and each without knowledge or notice of the other's mortgage:—

Held, that the Registry Act did not apply; that the defendant's mortgage was valid only by estoppel and was fed by estoppel to the extent only of the interest taken by the purchaser under the deed; that that interest was subject to the right of the plaintiff to have a legal mortgage for the balance of purchase money, and that the plaintiff's mortgage was therefore entitled to priority.

Nevitt v. McMurray (1886), 14 A. R. 126, applied.

Judgment of *ROSE, J.*, reversed. *McMillan v. Munro*, 288.

RENT.

See BANKRUPTCY AND INSOLVENCY, 3.

RESERVE FUND.

See ASSESSMENT AND TAXES, 2.

RIGHT OF WAY.

See EASEMENT.

SALE.

See SHIP—*Hesselbacher v. Ballantyne*, 36.

SCHOOLS.

High Schools—Pupils from Adjacent Municipality—Municipal Corporations—"Municipal Council"—Mandamus.]

Under its Act of In-

corporation, 47 Vict. ch. 57 (O.), the town of Port Arthur has the same rights and powers in regard to the organization and maintenance of high schools as other incorporated towns.

A board of trustees of a high school may be appointed by resolution of the municipal council having jurisdiction; a by-law is not necessary.

The opinion bearing on this point expressed in *Township of Pembroke v. Canada Central R. W. Co.* (1882), 3 O. R. 503, at p. 508, preferred to that in *Dawson v. Town of Sault Ste. Marie* (1889), 18 O. R. 556.

By 60 Vict. ch. 14, sec. 73 (O.), it is enacted that "the municipal council * * shall pay for the maintenance of pupils * * ."

Held, that the municipal corporation and not the individual members of the council are liable.

Judgment of FALCONBRIDGE, J., ordering the town of Fort William to pay to the Port Arthur High School Board a proportion of the cost of maintenance of the high school in respect of pupils residing in the town attending the high school affirmed, but that part thereof directing a mandamus to the mayor and councillors of the town to pass a resolution to the treasurer to pay the amount struck out as unnecessary. *Port Arthur High School Board v. Town of Fort William*, 522.

SEAL.

See COMPANY.

SHERIFF.

See Gignac v. Iler, 393.

SHIP.

Sale—Unregistered Lien—Notice—Merchant Shipping Act, 1894—[57-58 Vict. ch. 60, secs. 56, 57 (Imp.).]—While under section 57 of the Merchant Shipping Act, 1894, 57-58 Vict. ch. 60 (Imp.), unregistered equitable interests can be enforced as between the parties immediately affected, the effect of section 56 is that a purchaser from the registered owner takes a title free from unregistered equitable interests even though he has notice of them.

Judgment of ROBERTSON, J., reversed. *Luffman v. Luffman*, 48.

See INSURANCE, 2.

SPECIFIC PERFORMANCE.

See STREET RAILWAYS.

STATUTES.

*Construction—Amendment—Retrospective Effect—Limitation of Actions—*54 Vict. ch. 42, sec. 16 (O.).]—Unless there is a clear declaration in the Act itself to that effect, or unless the surrounding circumstances render that construction inevitable, an Act should not be so construed as to interfere with vested rights.

Section 16 of 54 Vict. ch. 42 (O.), limiting the time for the enforcement of claims for compensation by persons injuriously affected by the exercise of municipal powers of expropriation does not apply to a claim existing at the time of the passage of the Act.

Judgment of the Official Arbitrator affirmed. *In re Roden and The City of Toronto*, 12.

14 & 15 Vict. ch. 6.]—See WILL, 2.

R. S. O. (1877) ch. 102, sec. 4.]—See DEED.

43 Vict. ch. 14, sec. 2 (O.).]—See WILL, 2.

R. S. O. (1887) ch. 124, sec. 20, sub-sec. 4.]—See BANKRUPTCY AND INSOLVENCY, 1.

R. S. O. (1887) ch. 136.]—See BENEVOLENT SOCIETY, 3.

51 Vict. ch. 29 (D.).]—See RAILWAYS.

51 Vict. ch. 29, secs. 11, 187, 188 (D.).]—See RAILWAYS, 1.

51 Vict. ch. 29, sec. 161 (D.).]—See RAILWAYS, 2.

51 Vict. ch. 29, sec. 289 (D.).]—See RAILWAYS, 5.

52 Vict. ch. 32, sec. 6 (O.).]—See BENEVOLENT SOCIETY, 1.

54 Vict. ch. 42, sec. 16 (O.).]—See STATUTES.

55 Vict. ch. 39, sec. 33 (O.).]—See INSURANCE, 1.

57 & 58 Vict. ch. 60, secs. 56, 57 (Imp.).]—See SHIP.

57 Vict. ch. 55 (O.).]—See DITCHES AND WATERCOURSES ACT.

57 Vict. ch. 56, sec. 73 (O.).]—See DRAINAGE, 1.

58 Vict. ch. 26, sec. 3, sub-sec. 1 (O.).]—See BANKRUPTCY AND INSOLVENCY, 3.

R. S. O. ch. 62.]—See ARBITRATION AND AWARD.

R. S. O. ch. 127, sec. 4.]—See DEVOLUTION OF ESTATES ACT.

R. S. O. ch. 166.]—See RAILWAYS, 5.

STATUTORY WARNING.

See RAILWAYS, 4, 5.

STREET RAILWAYS.

Contract—Running Cars—Specific Performance—Injunction—Mandamus.]—The Court will not order specific performance of an agreement by an electric railway company to run its cars on certain streets at certain hours and with certain officers, as the Court cannot oversee the carrying out of the judgment if granted.

Nor will the Court grant an injunction restraining the company from carrying out such an agreement to the extent to which they are willing to carry it out unless and until they carry it out *in toto*, as this would also involve the same minute supervision.

Nor will the Court direct in an action the issue of a writ of mandamus, where the duty to be fulfilled arises out of an agreement of this kind the performance of which in specie is not deemed enforceable by the Court.

Semble, a prerogative writ of mandamus cannot be granted in an action but only on motion, but even if it can be granted in an action it will not be granted to enforce private rights arising under an agreement.

Judgment of STREET, J., 28 O. R. 399, affirmed, MACLENNAN, J. A., dissenting. *City of Kingston v. Kingston, Portsmouth and Cataraqui Electric R. W. Co.*, 462.

See ASSESSMENT AND TAXES, 1.

TELEPHONE COMPANY.

See ASSESSMENT AND TAXES, 3.

TENANTS IN COMMON.

See IMPROVEMENTS.

THEFT.*See* EXTRADITION.**TORONTO RAILWAY COMPANY.***See* ASSESSMENT AND TAXES, 1.**TORT.***See* MASTER AND SERVANT.**TRADE MARK.**

Trade Name—"Fly Poison Pad."]
 —The plaintiffs sold sheets of paper, saturated with fly poison, under the name of "Wilson's Fly Poison Pad." These words were registered by them as a trade mark and were printed on each sheet. The defendants also manufactured and sold fly paper poison in the form of pads, but printed upon them the words, "Lyman Bros. & Co. Lightning Fly Paper Poison," and upon the packages containing them the additional words, "6 pads in a package" or "3 pads in a package." The evidence shewed that sheets of fly paper poison had become known to the trade as "pads," but failed to shew that it was so identified with the plaintiffs' goods as to deceive the public into the belief that in purchasing pads they were getting the plaintiffs' goods:—

Held, that the word "pads" had become so far *publici juris*, that the defendants, as manufacturers and vendors of fly poison, were entitled to describe as "pads" sheets of paper prepared by them, the general appearance of the sheets being different, and the defendants' name appearing prominently on them.

Judgment of ROSE, J., affirmed.
Wilson v. Lyman, 303.

TRADE NAME.*See* TRADE MARK.**TRUSTEES.***See* DITCHES AND WATERCOURSES-
ACT.**VENDOR'S LIEN.***See* LIEN.**VESSEL.***See* INSURANCE, 2—SHIP.**WATER AND WATERCOURSES.**

Interference with Navigation—Private Right of Action.—The plaintiff was a fisherman living on a small farm fronting on, and about three miles from the mouth of, a navigable stream flowing into Lake Superior. He was in the habit of using a sail boat to go from his house to the lake and thence to Sault Ste. Marie and other points and was also sometimes employed by neighbours to bring to them in this sail boat supplies and provisions. He also used other boats for fishing purposes. The defendants brought large quantities of timber down the stream and kept it in booms at the mouth so that for the whole summer access to the stream by the boat was cut off:—

Held, that the plaintiff had sufficient special interest to enable him to maintain an action for damages.

Judgment of ROSE, J., affirmed.
Drake v. Sault Ste. Marie Pulp and Paper Co., 251.

See DITCHES AND WATERCOURSES-
ACT.

WILL.

1. *Charitable Devise—Trust for Benefit of Citizens of the United States of African Descent.*—A devise of lands in Ontario, by a testator dying in 1891, in trust “to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights” is a charitable devise and void, and the fact that the trust is to be executed in a foreign country makes no difference.

Judgment of *BOYD, C.*, 28 O. R. 412, affirmed. *Lewis v. Doerle*, 206.

2. *Construction—Change in Law*—“*Heirs*”—*Primogeniture*—14 & 15 Vict. ch. 6—43 Vict. ch. 14, sec. 2 (O.).]—A testator, who died on the 8th of November, 1867, by his will, made on the 15th of October, 1867, devised lands in Ontario to his wife until her death or marriage, and upon her death or marriage to his son, “should he be living at the happening of either of said contingencies,” and if not then living “unto the heirs of the said (son).” The son died in July, 1885, intestate and unmarried, and the widow died in February, 1887 :—

Held, that the Act abolishing heirship by primogeniture, 14 & 15 Vict. ch. 6, applied, and that all the brothers and sisters of the son were

his “heirs” and entitled to take under this devise.

Tylee v. Deal (1873), 19 Gr. 601, and *Baldwin v. Kingstone* (1890), 18 A. R. 63, distinguished.

Judgment of *ROSE, J.*, reversed. *Sparks v. Wolff*, 326.

WORDS.

“*Current Quarter.*”]—See **BANKRUPTCY AND INSOLVENCY.**

“*Fly Poison Pad.*”]—See **TRADE MARK.**

“*Heirs.*”]—See **WILL.**

“*Municipal Council.*”] — See **SCHOOLS.**

“*Owner.*”] — See **DITCHES AND WATERCOURSES ACT.**

“*Person Injuriously Affected.*”]—See **DRAINAGE.**

“*Renewed Contract.*”] — See **INSURANCE.**

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See **RAILWAYS, 5.**

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